

submitting such filing will constitute and become a substitute for the manual signature of the authorized signer. Any written notice filed must be followed up with direct communication to the Regional office of Commission which has supervisory authority over the futures commission merchant whereby the Commission acknowledges receipt of the notice; and

(3) After making a withdrawal requiring the approval and notice required in paragraphs (c)(1) and (c)(2) of this section, and before the next daily segregated funds calculation, no futures commission merchant may make any further withdrawals from accounts holding Cleared Swaps Customer Account funds, except to or for the benefit of Cleared Swaps Customers, without complying with paragraph (c)(1) of this section and filing a written notice with the Commission under paragraph (c)(2)(vi) of this section and its designated self-regulatory organization signed by the chief executive officer, chief finance officer, or other senior official. The written notice must:

(i) List the amount of funds provided to each recipient and each recipient's name;

(ii) Disclose the reason for each withdrawal;

(iii) Confirm that the chief executive officer, chief finance officer, or other senior official (and identify of the person if different from the person who signed the notice) pre-approved the withdrawal in writing;

(iv) Disclose the current estimate of the futures commission merchant's remaining total residual interest in the segregated accounts holding Cleared Swaps Customer Account funds after the withdrawal; and

(v) Include a representation that to the best of the notice signatory's knowledge and reasonable belief the futures commission merchant remains in compliance with the segregation requirements after the withdrawal.

(d) If a futures commission merchant withdraws funds that are not for the benefit of Cleared Swaps Customers from Cleared Swaps Customer Accounts, and the withdrawal causes the futures commission merchant to not hold sufficient funds in Cleared Swaps Customer Accounts to meet its tar-

geted residual interest, as required to be computed under §1.11 of this chapter, the futures commission merchant must deposit its own funds into the Cleared Swaps Customer Accounts to restore the targeted amount of residual interest on the next business day, or, if appropriate, revise the futures commission merchant's targeted amount of residual interest pursuant to the policies and procedures required by §1.11 of this chapter. Notwithstanding the foregoing, if the futures commission merchant's residual interest in Cleared Swaps Customer Accounts is less than the amount required to be maintained by §22.2 at any particular point in time, the futures commission merchant must immediately restore the residual interest to exceed the sum of such amounts. Any proprietary funds deposited in Cleared Swaps Customer Accounts must be unencumbered and otherwise compliant with §1.25 of this chapter, as applicable.

(e) Notwithstanding any other provision of this part, a futures commission merchant may not withdraw funds that are not for the benefit of Cleared Swaps Customers from a Cleared Swaps Customer Account unless the futures commission merchant follows its policies and procedures required by §1.11 of this chapter.

[78 FR 68647, Nov. 14, 2013]

## PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

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Sec.

23.1–23.20 [Reserved]

### Subpart B—Registration

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23.22 Prohibition against statutory disqualification in the case of an associated person of a swap dealer or major swap participant.

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AUTHORITY: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b–1, 6c, 6p, 6r, 6s, 6t, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21.

SOURCE: 77 FR 2628, Jan. 19, 2012, unless otherwise noted.

### Subpart A [Reserved]

§§ 23.1–23.20 [Reserved]

**Subpart B—Registration**

**§ 23.21 Registration of swap dealers and major swap participants.**

(a) Each person who comes within the definition of the term “swap dealer” in section 1a(49) of the Act, as such term may be further defined by the Commission, is subject to the registration provisions under the Act and to part 3 of this chapter.

(b) Each person who comes within the definition of the term “major swap participant” in section 1a(33) of the Act, as such term may be further defined by the Commission, is subject to the registration provisions under the Act and to part 3 of this chapter.

(c) Each affiliate of an insured depository institution described in section 716(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203 section 716(c), 124 Stat. 1376 (2010)) is required to be registered as a swap dealer if the affiliate is a swap dealer or as a major swap participant if the affiliate is a major swap participant.

**§ 23.22 Prohibition against statutory disqualification in the case of an associated person of a swap dealer or major swap participant.**

(a) *Definition.* For purposes of this section, the term “person” means an “associated person of a swap dealer or major swap participant” as defined in section 1a(4) of the Act and § 1.3(aa)(6) of this chapter, but does not include an individual employed in a clerical or ministerial capacity.

(b) *Fitness.* No swap dealer or major swap participant may permit a person who is subject to a statutory disqualification under section 8a(2) or 8a(3) of the Act to effect or be involved in effecting swaps on behalf of the swap dealer or major swap participant, if the swap dealer or major swap participant knows, or in the exercise of reasonable care should know, of the statutory disqualification; *Provided, however,* that the prohibition set forth in this paragraph (b) shall not apply to any person listed as a principal or registered as an associated person of a futures commission merchant, retail foreign exchange

dealer, introducing broker, commodity pool operator, commodity trading advisor, or leverage transaction merchant, or any person registered as a floor broker or floor trader, notwithstanding that the person is subject to a disqualification from registration under section 8a(2) or 8a(3) of the Act.

(c) *Dual and multiple associations.* (1) A person who is already associated as an associated person of a swap dealer or major swap participant may become associated as an associated person of another swap dealer or major swap participant if the other swap dealer or major swap participant meets the requirements set forth in § 3.60(b)(2)(i)(A) of this chapter.

(2) Each swap dealer and major swap participant associated with such associated person shall supervise that associated person, and each swap dealer and major swap participant is jointly and severally responsible for the conduct of the associated person with respect to the:

(i) Solicitation or acceptance of customer orders,

(ii) Solicitation of funds, securities or property for a participation in a commodity pool,

(iii) Solicitation of a client's or prospective client's discretionary account,

(iv) Solicitation or acceptance of leverage customers' orders for leverage transactions,

(v) Solicitation or acceptance of swaps, and

(vi) Associated person's supervision of any person or persons engaged in any of the foregoing solicitations or acceptances, with respect to any customers common to it and any other swap dealer or major swap participant.

[77 FR 2628, Jan. 19, 2012, as amended at 78 FR 20792, Apr. 8, 2013; 78 FR 64175, Oct. 28, 2013]

§§ 23.23–23.40 [Reserved]

**Subpart E—Capital and Margin Requirements for Swap Dealers and Major Swap Participants**

SOURCE: 81 FR 695, Jan. 6, 2016, unless otherwise noted.

## §§ 23.100–23.149 [Reserved]

## § 23.150 Scope.

(a) The margin requirements set forth in §§23.150 through 23.161 shall apply to uncleared swaps, as defined in §23.151, that are executed after the applicable compliance dates set forth in §23.161.

(b) The requirements set forth in §§23.150 through 23.161 shall not apply to a swap if the counterparty:

(1) Qualifies for an exception from clearing under section 2(h)(7)(A) of the Act and implementing regulations;

(2) Qualifies for an exemption from clearing under a rule, regulation, or order issued by the Commission pursuant to section 4(c)(1) of the Act concerning cooperative entities that would otherwise be subject to the requirements of section 2(h)(1)(A) of the Act; or

(3) Satisfies the criteria in section 2(h)(7)(D) of the Act and implementing regulations.

## § 23.151 Definitions applicable to margin requirements.

For the purposes of §§23.150 through 23.161:

*Bank holding company* has the meaning specified in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

*Broker* has the meaning specified in section 3(a)(4) the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)).

*Business day* means any day other than a Saturday, Sunday, or legal holiday.

*Company* means a corporation, partnership, limited liability company, business trust, special purpose entity, association, or similar organization.

*Counterparty* means the other party to a swap to which a covered swap entity is a party.

*Covered counterparty* means a financial end user with material swaps exposure or a swap entity that enters into a swap with a covered swap entity.

*Covered swap entity* means a swap dealer or major swap participant for which there is no prudential regulator.

*Cross-currency swap* means a swap in which one party exchanges with another party principal and interest rate payments in one currency for principal

and interest rate payments in another currency, and the exchange of principal occurs on the date the swap is entered into, with a reversal of the exchange of principal at a later date that is agreed upon when the swap is entered into.

*Currency of Settlement* means a currency in which a party has agreed to discharge payment obligations related to an uncleared swap or a group of uncleared swaps subject to a master netting agreement at the regularly occurring dates on which such payments are due in the ordinary course.

*Data source* means an entity and/or method from which or by which a covered swap entity obtains prices for swaps or values for other inputs used in a margin calculation.

*Day of execution* means the calendar day at the time the parties enter into an uncleared swap, provided:

(1) If each party is in a different calendar day at the time the parties enter into the uncleared swap, the day of execution is deemed the latter of the two dates; and

(2) If an uncleared swap is—

(i) Entered into after 4:00 p.m. in the location of a party; or

(ii) Entered into on a day that is not a business day in the location of a party, then the uncleared swap is deemed to have been entered into on the immediately succeeding day that is a business day for both parties, and both parties shall determine the day of execution with reference to that business day.

*Dealer* has the meaning specified in section 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(5)).

*Depository institution* has the meaning specified in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

*Eligible collateral* means collateral described in §23.156.

*Eligible master netting agreement* means a written, legally enforceable agreement provided that:

(1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default following any stay permitted by paragraph (2) of this definition, including upon an event of

receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty;

(2) The agreement provides the covered swap entity the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set off collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(i) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*), Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381 *et seq.*), the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4617), or the Farm Credit Act of 1971, as amended (12 U.S.C. 2183 and 2279cc), or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (2)(i) in order to facilitate the orderly resolution of the defaulting counterparty; or

(ii) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i) of this definition;

(3) The agreement does not contain a walkaway clause (that is, a provision that permits a non-defaulting counterparty to make a lower payment than it otherwise would make under the agreement, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the agreement); and

(4) A covered swap entity that relies on the agreement for purposes of calculating the margin required by this part must:

(i) Conduct sufficient legal review to conclude with a well-founded basis (and maintain sufficient written documentation of that legal review) that:

(A) The agreement meets the requirements of paragraph (2) of this definition; and

(B) In the event of a legal challenge (including one resulting from default or from receivership, conservatorship, insolvency, liquidation, or similar proceeding) the relevant court and administrative authorities would find the agreement to be legal, valid, binding, and enforceable under the law of the relevant jurisdictions; and

(ii) Establish and maintain written procedures to monitor possible changes in relevant law and to ensure that the agreement continues to satisfy the requirements of this definition.

*Financial end user means—*

(1) A counterparty that is not a swap entity and that is:

(i) A bank holding company or a margin affiliate thereof; a savings and loan holding company; a U.S. intermediate holding company established or designated for purposes of compliance with 12 CFR 252.153; or a nonbank financial institution supervised by the Board of Governors of the Federal Reserve System under Title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323);

(ii) A depository institution; a foreign bank; a Federal credit union or State credit union as defined in section 2 of the Federal Credit Union Act (12 U.S.C. 1752(1) and (6)); an institution that functions solely in a trust or fiduciary capacity as described in section 2(c)(2)(D) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(D)); an industrial loan company, an industrial bank, or other similar institution described in section 2(c)(2)(H) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(H));

(iii) An entity that is state-licensed or registered as:

(A) A credit or lending entity, including a finance company; money lender; installment lender; consumer lender or lending company; mortgage lender, broker, or bank; motor vehicle title pledge lender; payday or deferred deposit lender; premium finance company; commercial finance or lending company; or commercial mortgage company; except entities registered or licensed solely on account of financing the entity's direct sales of goods or services to customers;

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(B) A money services business, including a check casher; money transmitter; currency dealer or exchange; or money order or traveler's check issuer;

(iv) A regulated entity as defined in section 1303(20) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4502(20)) or any entity for which the Federal Housing Finance Agency or its successor is the primary federal regulator;

(v) Any institution chartered in accordance with the Farm Credit Act of 1971, as amended, 12 U.S.C. 2001 *et seq.* that is regulated by the Farm Credit Administration;

(vi) A securities holding company; a broker or dealer; an investment adviser as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)); an investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), a company that has elected to be regulated as a business development company pursuant to section 54(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-53(a)), or a person that is registered with the U.S. Securities and Exchange Commission as a security-based swap dealer or a major security-based swap participant pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(vii) A private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)); an entity that would be an investment company under section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3) but for section 3(c)(5)(C); or an entity that is deemed not to be an investment company under section 3 of the Investment Company Act of 1940 pursuant to Investment Company Act Rule 3a-7 (§270.3a-7 of this title) of the Securities and Exchange Commission;

(viii) A commodity pool, a commodity pool operator, a commodity trading advisor, a floor broker, a floor trader, an introducing broker or a futures commission merchant;

(ix) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement In-

come and Security Act of 1974 (29 U.S.C. 1002);

(x) An entity that is organized as an insurance company, primarily engaged in writing insurance or reinsuring risks underwritten by insurance companies, or is subject to supervision as such by a State insurance regulator or foreign insurance regulator;

(xi) An entity, person, or arrangement that is, or holds itself out as being, an entity, person, or arrangement that raises money from investors, accepts money from clients, or uses its own money primarily for investing or trading or facilitating the investing or trading in loans, securities, swaps, funds, or other assets; or

(xii) An entity that would be a financial end user described in paragraph (1) of this definition or a swap entity if it were organized under the laws of the United States or any State thereof.

(2) The term "financial end user" does not include any counterparty that is:

(i) A sovereign entity;

(ii) A multilateral development bank;

(iii) The Bank for International Settlements;

(iv) An entity that is exempt from the definition of financial entity pursuant to section 2(h)(7)(C)(iii) of the Act and implementing regulations;

(v) An affiliate that qualifies for the exemption from clearing pursuant to section 2(h)(7)(D) of the Act; or

(vi) An eligible treasury affiliate that the Commission exempts from the requirements of §§ 23.150 through 23.161 by rule.

*Foreign bank* means an organization that is organized under the laws of a foreign country and that engages directly in the business of banking outside the United States.

*Foreign exchange forward* has the meaning specified in section 1a(24) of the Act.

*Foreign exchange swap* has the meaning specified in section 1a(25) of the Act.

*Initial margin* means the collateral, as calculated in accordance with § 23.154 that is collected or posted in connection with one or more uncleared swaps.

*Initial margin model* means an internal risk management model that:

(1) Has been developed and designed to identify an appropriate, risk-based amount of initial margin that the covered swap entity must collect with respect to one or more non-cleared swaps to which the covered swap entity is a party; and

(2) Has been approved by the Commission or a registered futures association pursuant to § 23.154(b).

*Initial margin threshold amount* means an aggregate credit exposure of \$50 million resulting from all uncleared swaps between a covered swap entity and its margin affiliates on the one hand, and a covered counterparty and its margin affiliates on the other. For purposes of this calculation, an entity shall not count a swap that is exempt pursuant to § 23.150(b).

*Major currencies* means—

- (1) United States Dollar (USD);
- (2) Canadian Dollar (CAD);
- (3) Euro (EUR);
- (4) United Kingdom Pound (GBP);
- (5) Japanese Yen (JPY);
- (6) Swiss Franc (CHF);
- (7) New Zealand Dollar (NZD);
- (8) Australian Dollar (AUD);
- (9) Swedish Kronor (SEK);
- (10) Danish Kroner (DKK);
- (11) Norwegian Krone (NOK); and
- (12) Any other currency designated by the Commission.

*Margin affiliate.* A company is a margin affiliate of another company if:

(1) Either company consolidates the other on a financial statement prepared in accordance with U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards,

(2) Both companies are consolidated with a third company on a financial statement prepared in accordance with such principles or standards, or

(3) For a company that is not subject to such principles or standards, if consolidation as described in paragraph (1) or (2) of this definition would have occurred if such principles or standards had applied.

*Market intermediary* means—

- (1) A securities holding company;
- (2) A broker or dealer;
- (3) A futures commission merchant;
- (4) A swap dealer; or
- (5) A security-based swap dealer.

*Material swaps exposure* for an entity means that the entity and its margin affiliates have an average daily aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards, and foreign exchange swaps with all counterparties for June, July and August of the previous calendar year that exceeds \$8 billion, where such amount is calculated only for business days. An entity shall count the average daily aggregate notional amount of an uncleared swap, an uncleared security-based swap, a foreign exchange forward, or a foreign exchange swap between the entity and a margin affiliate only one time. For purposes of this calculation, an entity shall not count a swap that is exempt pursuant to § 23.150(b) or a security-based swap that qualifies for an exemption under section 3C(g)(10) of the Securities Exchange Act of 1934 (15 U.S.C. 78c-3(g)(4)) and implementing regulations or that satisfies the criteria in section 3C(g)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78c-3(g)(4)) and implementing regulations.

*Minimum transfer amount* means a combined initial and variation margin amount under which no actual transfer of funds is required. The minimum transfer amount shall be \$500,000.

*Multilateral development bank* means:

- (1) The International Bank for Reconstruction and Development;
- (2) The Multilateral Investment Guarantee Agency;
- (3) The International Finance Corporation;
- (4) The Inter-American Development Bank;
- (5) The Asian Development Bank;
- (6) The African Development Bank;
- (7) The European Bank for Reconstruction and Development;
- (8) The European Investment Bank;
- (9) The European Investment Fund;
- (10) The Nordic Investment Bank;
- (11) The Caribbean Development Bank;
- (12) The Islamic Development Bank;
- (13) The Council of Europe Development Bank; and
- (14) Any other entity that provides financing for national or regional development in which the U.S. government

is a shareholder or contributing member or which the Commission determines poses comparable credit risk.

*Non-financial end user* means a counterparty that is not a swap dealer, a major swap participant, or a financial end user.

*Prudential regulator* has the meaning specified in section 1a(39) of the Act.

*Savings and loan holding company* has the meaning specified in section 10(n) of the Home Owners' Loan Act (12 U.S.C. 1467a(n)).

*Securities holding company* has the meaning specified in section 618 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 1850a).

*Security-based swap* has the meaning specified in section 3(a)(68) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(68)).

*Sovereign entity* means a central government (including the U.S. government) or an agency, department, ministry, or central bank of a central government.

*State* means any State, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands.

*Swap entity* means a person that is registered with the Commission as a swap dealer or major swap participant pursuant to the Act.

*Uncleared security-based swap* means a security-based swap that is not, directly or indirectly, submitted to and cleared by a clearing agency registered with the Securities and Exchange Commission pursuant to section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78a-1) or by a clearing agency that the U.S. Securities and Exchange Commission has exempted from registration by rule or order pursuant to section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78a-1).

*Uncleared swap* means a swap that is not cleared by a registered derivatives clearing organization, or by a clearing organization that the Commission has exempted from registration by rule or order pursuant to section 5b(h) of the Act.

*U.S. Government-sponsored enterprise* means an entity established or chartered by the U.S. government to serve public purposes specified by federal statute but whose debt obligations are not explicitly guaranteed by the full faith and credit of the U.S. government.

*Variation margin* means collateral provided by a party to its counterparty to meet the performance of its obligation under one or more uncleared swaps between the parties as a result of a change in value of such obligations since the trade was executed or the last time such collateral was provided.

*Variation margin amount* means the cumulative mark-to-market change in value to a covered swap entity of an uncleared swap, as measured from the date it is entered into (or in the case of an uncleared swap that has a positive or negative value to a covered swap entity on the date it is entered into, such positive or negative value plus any cumulative mark-to-market change in value to the covered swap entity of an uncleared swap after such date), less the value of all variation margin previously collected, plus the value of all variation margin previously posted with respect to such uncleared swap.

#### § 23.152 Collection and posting of initial margin.

(a) *Collection*—(1) *Initial obligation*. On or before the business day after execution of an uncleared swap between a covered swap entity and a covered counterparty, the covered swap entity shall collect initial margin from the covered counterparty in an amount equal to or greater than an amount calculated pursuant to § 23.154, in a form that complies with § 23.156, and pursuant to custodial arrangements that comply with § 23.157.

(2) *Continuing obligation*. The covered swap entity shall continue to hold initial margin from the covered counterparty in an amount equal to or greater than an amount calculated each business day pursuant to § 23.154, in a form that complies with § 23.156, and pursuant to custodial arrangements that comply with § 23.157, until such uncleared swap is terminated or expires.



(b) *Posting*—(1) *Initial obligation*. On or before the business day after execution of an uncleared swap between a covered swap entity and a financial end user with material swaps exposure, the covered swap entity shall post initial margin with the counterparty in an amount equal to or greater than an amount calculated pursuant to § 23.154, in a form that complies with § 23.156, and pursuant to custodial arrangements that comply with § 23.157.

(2) *Continuing obligation*. The covered swap entity shall continue to post initial margin with the counterparty in an amount equal to or greater than an amount calculated each business day pursuant to § 23.154, in a form that complies with § 23.156, and pursuant to custodial arrangements that comply with § 23.157, until such uncleared swap is terminated or expires.

(3) *Minimum transfer amount*. A covered swap entity is not required to collect or to post initial margin pursuant to §§ 23.150 through 23.161 with respect to a particular counterparty unless and until the combined amount of initial margin and variation margin that is required pursuant to §§ 23.150 through 23.161 to be collected or posted and that has not been collected or posted with respect to the counterparty is greater than \$500,000.

(c) *Netting*. (1) To the extent that one or more uncleared swaps are executed pursuant to an eligible master netting agreement between a covered swap entity and covered counterparty, a covered swap entity may calculate and comply with the applicable initial margin requirements of §§ 23.150 through 23.161 on an aggregate net basis with respect to all uncleared swaps governed by such agreement, subject to paragraph (c)(2) of this section.

(2)(i) Except as permitted in paragraph (c)(2)(ii) of this section, if an eligible master netting agreement covers uncleared swaps entered into on or after the applicable compliance date set forth in § 23.161, all the uncleared swaps covered by that agreement are subject to the requirements of §§ 23.150 through 23.161 and included in the aggregate netting portfolio for the purposes of calculating and complying with the margin requirements of §§ 23.150 through 23.161.

(ii) An eligible master netting agreement may identify one or more separate netting portfolios that independently meet the requirements in paragraph (1) of the definition of “eligible master netting agreement” in § 23.151 and to which collection and posting of margin applies on an aggregate net basis separate from and exclusive of any other uncleared swaps covered by the eligible master netting agreement. Any such netting portfolio that contains any uncleared swap entered into on or after the applicable compliance date set forth in § 23.161 is subject to the requirements of §§ 23.150 through 23.161. Any such netting portfolio that contains only uncleared swaps entered into before the applicable compliance date is not subject to the requirements of §§ 23.150 through 23.161.

(d) *Satisfaction of collection and posting requirements*. A covered swap entity shall not be deemed to have violated its obligation to collect or to post initial margin from a covered counterparty if:

(1) The covered counterparty has refused or otherwise failed to provide, or to accept, the required initial margin to, or from, the covered swap entity; and

(2) The covered swap entity has:

(i) Made the necessary efforts to collect or to post the required initial margin, including the timely initiation and continued pursuit of formal dispute resolution mechanisms, including pursuant to § 23.504(b)(4), if applicable, or has otherwise demonstrated upon request to the satisfaction of the Commission that it has made appropriate efforts to collect or to post the required initial margin; or

(ii) Commenced termination of the uncleared swap with the covered counterparty promptly following the applicable cure period and notification requirements.

#### **§ 23.153 Collection and posting of variation margin.**

(a) *Initial obligation*. On or before the business day after the day of execution of an uncleared swap between a covered swap entity and a counterparty that is a swap entity or a financial end user, the covered swap entity shall collect the variation margin amount from the

counterparty when the amount is positive, or post the variation margin amount with the counterparty when the amount is negative as calculated pursuant to § 23.155 and in a form that complies with § 23.156.

(b) *Continuing obligation.* The covered swap entity shall continue to collect the variation margin amount from, or to post the variation margin amount with, the counterparty as calculated each business day pursuant to § 23.155 and in a form that complies with § 23.156 each business day until such uncleared swap is terminated or expires.

(c) *Minimum transfer amount.* A covered swap entity is not required to collect or to post variation margin pursuant to §§ 23.150 through 23.161 with respect to a particular counterparty unless and until the combined amount of initial margin and variation margin that is required pursuant to §§ 23.150 through 23.161 to be collected or posted and that has not been collected or posted with respect to the counterparty is greater than \$500,000.

(d) *Netting.* (1) To the extent that more than one uncleared swap is executed pursuant to an eligible master netting agreement between a covered swap entity and a counterparty, a covered swap entity may calculate and comply with the applicable variation margin requirements of this section on an aggregate basis with respect to all uncleared swaps governed by such agreement subject to paragraph (d)(2) of this section.

(2)(i) Except as permitted in paragraph (d)(2)(ii) of this section, if an eligible master netting agreement covers uncleared swaps entered into on or after the applicable compliance date set forth in § 23.161, all the uncleared swaps covered by that agreement are subject to the requirements of §§ 23.150 through 23.161 and included in the aggregate netting portfolio for the purposes of calculating and complying with the margin requirements of §§ 23.150 through 23.161.

(ii) An eligible master netting agreement may identify one or more separate netting portfolios that independently meet the requirements in paragraph (1) of the definition of “eligible master netting agreement” in § 23.151

and to which collection and posting of margin applies on an aggregate net basis separate from and exclusive of any other uncleared swaps covered by the eligible master netting agreement. Any such netting portfolio that contains any uncleared swap entered into on or after the applicable compliance date set forth in § 23.161 is subject to the requirements of §§ 23.150 through 23.161. Any such netting portfolio that contains only uncleared swaps entered into before the applicable compliance date is not subject to the requirements of §§ 23.150 through 23.161.

(e) *Satisfaction of collection and payment requirements.* A covered swap entity shall not be deemed to have violated its obligation to collect or to pay variation margin from a counterparty if:

(1) The counterparty has refused or otherwise failed to provide or to accept the required variation margin to or from the covered swap entity; and

(2) The covered swap entity has:

(i) Made the necessary efforts to collect or to post the required variation margin, including the timely initiation and continued pursuit of formal dispute resolution mechanisms, including pursuant to § 23.504(b)(4), if applicable, or has otherwise demonstrated upon request to the satisfaction of the Commission that it has made appropriate efforts to collect or to post the required variation margin; or

(ii) Commenced termination of the uncleared swap with the counterparty promptly following the applicable cure period and notification requirements.

#### § 23.154 Calculation of initial margin.

(a) *Means of calculation.* (1) Each business day each covered swap entity shall calculate an initial margin amount to be collected from each covered counterparty using:

(i) A risk-based model that meets the requirements of paragraph (b) of this section; or

(ii) The table-based method set forth in paragraph (c) of this section.

(2) Each business day each covered swap entity shall calculate an initial margin amount to be posted with each financial end user with material swaps exposure using:

(i) A risk-based model that meets the requirements of paragraph (b) of this section; or

(ii) The table-based method set forth in paragraph (c) of this section.

(3) Each covered swap entity may reduce the amounts calculated pursuant to paragraphs (a)(1) and (2) of this section by the initial margin threshold amount provided that the reduction does not include any portion of the initial margin threshold amount already applied by the covered swap entity or its margin affiliates in connection with other uncleared swaps with the counterparty or its margin affiliates.

(4) The amounts calculated pursuant to paragraph (a)(3) of this section shall not be less than zero.

(b) *Risk-based models*—(1) *Commission or registered futures association approval.*

(i) A covered swap entity shall obtain the written approval of the Commission or a registered futures association to use a model to calculate the initial margin required in §§ 23.150 through 23.161.

(ii) A covered swap entity shall demonstrate that the model satisfies all of the requirements of this section on an ongoing basis.

(iii) A covered swap entity shall notify the Commission and the registered futures association in writing 60 days prior to:

(A) Extending the use of an initial margin model that has been approved to an additional product type;

(B) Making any change to any initial margin model that has been approved that would result in a material change in the covered swap entity's assessment of initial margin requirements; or

(C) Making any material change to modeling assumptions used by the initial margin model.

(iv) The Commission or the registered futures association may rescind approval of the use of any initial margin model, in whole or in part, or may impose additional conditions or requirements if the Commission or the registered futures association determines, in its discretion, that the model no longer complies with this section.

(2) *Elements of the model.* (i) The initial margin model shall calculate an amount of initial margin that is equal

to the potential future exposure of the uncleared swap or netting portfolio of uncleared swaps covered by an eligible master netting agreement. Potential future exposure is an estimate of the one-tailed 99 percent confidence interval for an increase in the value of the uncleared swap or netting portfolio of uncleared swaps due to an instantaneous price shock that is equivalent to a movement in all material underlying risk factors, including prices, rates, and spreads, over a holding period equal to the shorter of ten business days or the maturity of the swap or netting portfolio.

(ii) All data used to calibrate the initial margin model shall be based on an equally weighted historical observation period of at least one year and not more than five years and must incorporate a period of significant financial stress for each broad asset class that is appropriate to the uncleared swaps to which the initial margin model is applied.

(iii) The initial margin model shall use risk factors sufficient to measure all material price risks inherent in the transactions for which initial margin is being calculated. The risk categories shall include, but should not be limited to, foreign exchange or interest rate risk, credit risk, equity risk, and commodity risk, as appropriate. For material exposures in significant currencies and markets, modeling techniques shall capture spread and basis risk and shall incorporate a sufficient number of segments of the yield curve to capture differences in volatility and imperfect correlation of rates along the yield curve.

(iv) In the case of an uncleared cross-currency swap, the initial margin model need not recognize any risks or risk factors associated with the fixed, physically-settled foreign exchange transactions associated with the exchange of principal embedded in the uncleared cross-currency swap. The initial margin model must recognize all material risks and risk factors associated with all other payments and cash flows that occur during the life of the uncleared cross-currency swap.

(v) The initial margin model may calculate initial margin for an uncleared swap or netting portfolio of

uncleared swaps covered by an eligible master netting agreement. It may reflect offsetting exposures, diversification, and other hedging benefits for uncleared swaps that are governed by the same eligible master netting agreement by incorporating empirical correlations within the following broad risk categories, provided the covered swap entity validates and demonstrates the reasonableness of its process for modeling and measuring hedging benefits: Commodity, credit, equity, and foreign exchange or interest rate. Empirical correlations under an eligible master netting agreement may be recognized by the model within each broad risk category, but not across broad risk categories.

(vi) If the initial margin model does not explicitly reflect offsetting exposures, diversification, and hedging benefits between subsets of uncleared swaps within a broad risk category, the covered swap entity shall calculate an amount of initial margin separately for each subset of uncleared swaps for which such relationships are explicitly recognized by the model. The sum of the initial margin amounts calculated for each subset of uncleared swaps within a broad risk category will be used to determine the aggregate initial margin due from the counterparty for the portfolio of uncleared swaps within the broad risk category.

(vii) The sum of the initial margin calculated for each broad risk category shall be used to determine the aggregate initial margin due from the counterparty.

(viii) The initial margin model shall not permit the calculation of any initial margin to be offset by, or otherwise take into account, any initial margin that may be owed or otherwise payable by the covered swap entity to the counterparty.

(ix) The initial margin model shall include all material risks arising from the nonlinear price characteristics of option positions or positions with embedded optionality and the sensitivity of the market value of the positions to changes in the volatility of the underlying rates, prices, or other material risk factors.

(x) The covered swap entity shall not omit any risk factor from the calculation

of its initial margin that the covered swap entity uses in its model unless it has first demonstrated to the satisfaction of the Commission or the registered futures association that such omission is appropriate.

(xi) The covered swap entity shall not incorporate any proxy or approximation used to capture the risks of the covered swap entity's uncleared swaps unless it has first demonstrated to the satisfaction of the Commission or the registered futures association that such proxy or approximation is appropriate.

(xii) The covered swap entity shall have a rigorous and well-defined process for re-estimating, re-evaluating, and updating its internal margin models to ensure continued applicability and relevance.

(xiii) The covered swap entity shall review and, as necessary, revise the data used to calibrate the initial margin model at least annually, and more frequently as market conditions warrant, to ensure that the data incorporate a period of significant financial stress appropriate to the uncleared swaps to which the initial margin model is applied.

(xiv) The level of sophistication of the initial margin model shall be commensurate with the complexity of the swaps to which it is applied. In calculating an initial margin amount, the initial margin model may make use of any of the generally accepted approaches for modeling the risk of a single instrument or portfolio of instruments.

(xv) The Commission or the registered futures association may in its discretion require a covered swap entity using an initial margin model to collect a greater amount of initial margin than that determined by the covered swap entity's initial margin model if the Commission or the registered futures association determines that the additional collateral is appropriate due to the nature, structure, or characteristics of the covered swap entity's transaction(s) or is commensurate with the risks associated with the transaction(s).

(3) [Reserved]

(4) *Periodic review.* A covered swap entity shall periodically, but no less frequently than annually, review its initial margin model in light of developments in financial markets and modeling technologies, and enhance the initial margin model as appropriate to ensure that it continues to meet the requirements for approval in this section.

(5) *Control, oversight, and validation mechanisms.* (i) The covered swap entity shall maintain a risk management unit in accordance with § 23.600(c)(4)(i) that is independent from the business trading unit (as defined in § 23.600).

(ii) The covered swap entity's risk control unit shall validate its initial margin model prior to implementation and on an ongoing basis. The covered swap entity's validation process shall be independent of the development, implementation, and operation of the initial margin model, or the validation process shall be subject to an independent review of its adequacy and effectiveness. The validation process shall include:

(A) An evaluation of the conceptual soundness of (including developmental evidence supporting) the initial margin model;

(B) An ongoing monitoring process that includes verification of processes and benchmarking by comparing the covered swap entity's initial margin model outputs (estimation of initial margin) with relevant alternative internal and external data sources or estimation techniques. The benchmark(s) must address the model's limitations. When applicable the covered swap entity should consider benchmarks that allow for non-normal distributions such as historical and Monte Carlo simulations. When applicable validation shall include benchmarking against observable margin standards to ensure that the initial margin required is not less than what a derivatives clearing organization would require for similar cleared transactions; and

(C) An outcomes analysis process that includes back testing the model. This analysis shall recognize and compensate for the challenges inherent in back testing over periods that do not contain significant financial stress.

(iii) If the validation process reveals any material problems with the model, the covered swap entity must promptly notify the Commission and the registered futures association of the problems, describe to the Commission and the registered futures association any remedial actions being taken, and adjust the model to ensure an appropriately conservative amount of required initial margin is being calculated.

(iv) In accordance with § 23.600(e)(2), the covered swap entity shall have an internal audit function independent of the business trading unit and the risk management unit that at least annually assesses the effectiveness of the controls supporting the initial margin model measurement systems, including the activities of the business trading units and risk control unit, compliance with policies and procedures, and calculation of the covered swap entity's initial margin requirements under this part. At least annually, the internal audit function shall report its findings to the covered swap entity's governing body, senior management, and chief compliance officer.

(6) *Documentation.* The covered swap entity shall adequately document all material aspects of its model, including management and valuation of uncleared swaps to which it applies, the control, oversight, and validation of the initial margin model, any review processes and the results of such processes.

(7) *Escalation procedures.* The covered swap entity must adequately document—

(i) Internal authorization procedures, including escalation procedures, that require review and approval of any change to the initial margin calculation under the initial margin model;

(ii) Demonstrable analysis that any basis for any such change is consistent with the requirements of this section; and

(iii) Independent review of such demonstrable analysis and approval.

(c) *Table-based method.* If a model meeting the standards set forth in paragraph (b) of this section is not used, initial margin shall be calculated in accordance with this paragraph.

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(1) *Standardized initial margin schedule.*

Asset class	Gross initial margin (% of notional exposure)
Credit: 0–2 year duration .....	2
Credit: 2–5 year duration .....	5
Credit: 5+ year duration .....	10
Commodity .....	15
Equity .....	15
Foreign Exchange/Currency .....	6
Cross Currency Swaps: 0–2 year duration ...	1
Cross Currency Swaps: 2–5 year duration ...	2
Cross Currency Swaps: 5+ year duration .....	4
Interest Rate: 0–2 year duration .....	1
Interest Rate: 2–5 year duration .....	2
Interest Rate: 5+ year duration .....	4
Other .....	15

(2) *Net to gross ratio adjustment.* (i) For multiple uncleared swaps subject to an eligible master netting agreement, the initial margin amount under the standardized table shall be computed according to this paragraph.

(ii)  $\text{Initial Margin} = 0.4 \times \text{Gross Initial Margin} + 0.6 \times \text{Net-to-Gross Ratio} \times \text{Gross Initial Margin}$ , where:

(A) Gross Initial Margin = the sum of the product of each uncleared swap's effective notional amount and the gross initial margin requirement for all uncleared swaps subject to the eligible master netting agreement;

(B) Net-to-Gross Ratio = the ratio of the net current replacement cost to the gross current replacement cost;

(C) Gross Current Replacement cost = the sum of the replacement cost for each uncleared swap subject to the eligible master netting agreement for which the cost is positive; and

(D) Net Current Replacement Cost = the total replacement cost for all uncleared swaps subject to the eligible master netting agreement.

(E) In cases where the gross replacement cost is zero, the Net-to-Gross Ratio shall be set to 1.0.

### § 23.155 Calculation of variation margin.

(a) *Means of calculation.* (1) Each business day each covered swap entity shall calculate variation margin for itself and for each counterparty that is a swap entity or a financial end user using methods, procedures, rules, and inputs that to the maximum extent practicable rely on recently-executed transactions, valuations provided by

independent third parties, or other objective criteria.

(2) Each covered swap entity shall have in place alternative methods for determining the value of an uncleared swap in the event of the unavailability or other failure of any input required to value a swap.

(b) *Control mechanisms.* (1) Each covered swap entity shall create and maintain documentation setting forth the variation methodology with sufficient specificity to allow the counterparty, the Commission, the registered futures association, and any applicable prudential regulator to calculate a reasonable approximation of the margin requirement independently.

(2) Each covered swap entity shall evaluate the reliability of its data sources at least annually, and make adjustments, as appropriate.

(3) The Commission or the registered futures association at any time may require a covered swap entity to provide further data or analysis concerning the methodology or a data source, including:

(i) An explanation of the manner in which the methodology meets the requirements of this section;

(ii) A description of the mechanics of the methodology;

(iii) The conceptual basis of the methodology;

(iv) The empirical support for the methodology; and

(v) The empirical support for the assessment of the data sources.

### § 23.156 Forms of margin.

(a) *Initial margin*—(1) *Eligible collateral.* A covered swap entity shall collect and post as initial margin for trades with a covered counterparty only the following types of collateral:

(i) Immediately available cash funds denominated in:

(A) U.S. dollars;

(B) A major currency;

(C) A currency of settlement for the uncleared swap;

(ii) A security that is issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, the U.S. Department of Treasury;

(iii) A security that is issued by, or unconditionally guaranteed as to the

timely payment of principal and interest by, a U.S. government agency (other than the U.S. Department of Treasury) whose obligations are fully guaranteed by the full faith and credit of the U.S. government;

(iv) A security that is issued by, or fully guaranteed as to the payment of principal and interest by, the European Central Bank or a sovereign entity that is assigned no higher than a 20 percent risk weight under the capital rules applicable to swap dealers subject to regulation by a prudential regulator;

(v) A publicly traded debt security issued by, or an asset-backed security fully guaranteed as to the timely payment of principal and interest by, a U.S. Government-sponsored enterprise that is operating with capital support or another form of direct financial assistance received from the U.S. government that enables the repayments of the U.S. Government-sponsored enterprise's eligible securities;

(vi) A security that is issued by, or fully guaranteed as to the payment of principal and interest by, the Bank for International Settlements, the International Monetary Fund, or a multilateral development bank;

(vii) Other publicly-traded debt that has been deemed acceptable as initial margin by a prudential regulator;

(viii) A publicly traded common equity security that is included in:

(A) The Standard & Poor's Composite 1500 Index or any other similar index of liquid and readily marketable equity securities as determined by the Commission; or

(B) An index that a covered swap entity's supervisor in a foreign jurisdiction recognizes for purposes of including publicly traded common equity as initial margin under applicable regulatory policy, if held in that foreign jurisdiction;

(ix) Securities in the form of redeemable securities in a pooled investment fund representing the security-holder's proportional interest in the fund's net assets and that are issued and redeemed only on the basis of the market value of the fund's net assets prepared each business day after the security-holder makes its investment commitment or redemption request to the

fund, if the fund's investments are limited to the following:

(A) Securities that are issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, the U.S. Department of the Treasury, and immediately-available cash funds denominated in U.S. dollars; or

(B) Securities denominated in a common currency and issued by, or fully guaranteed as to the payment of principal and interest by, the European Central Bank or a sovereign entity that is assigned no higher than a 20 percent risk weight under the capital rules applicable to swap dealers subject to regulation by a prudential regulator, and immediately-available cash funds denominated in the same currency; and

(C) Assets of the fund may not be transferred through securities lending, securities borrowing, repurchase agreements, reverse repurchase agreements, or other means that involve the fund having rights to acquire the same or similar assets from the transferee, or

(x) Gold.

(2) *Prohibition of certain assets.* A covered swap entity may not collect or post as initial margin any asset that is a security issued by:

(i) The covered swap entity or a margin affiliate of the covered swap entity (in the case of posting) or the counterparty or any margin affiliate of the counterparty (in the case of collection);

(ii) A bank holding company, a savings and loan holding company, a U.S. intermediate holding company established or designated for purposes of compliance with 12 CFR 252.153, a foreign bank, a depository institution, a market intermediary, a company that would be any of the foregoing if it were organized under the laws of the United States or any State, or a margin affiliate of any of the foregoing institutions, or

(iii) A nonbank financial institution supervised by the Board of Governors of the Federal Reserve System under Title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323).

(3) *Haircuts.* (i) The value of any eligible collateral collected or posted to

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satisfy initial margin requirements shall be subject to the sum of the following discounts, as applicable:

(A) An 8 percent discount for initial margin collateral denominated in a currency that is not the currency of settlement for the uncleared swap, ex-

cept for eligible types of collateral denominated in a single termination currency designated as payable to the non-posting counterparty as part of the eligible master netting agreement; and

(B) The discounts set forth in the following table:

STANDARDIZED HAIRCUT SCHEDULE

Cash in same currency as swap obligation .....	0.0
Eligible government and related debt (e.g., central bank, multilateral development bank, GSE securities identified in paragraph (a)(1)(iv) of this section): Residual maturity less than one-year .....	0.5
Eligible government and related debt (e.g., central bank, multilateral development bank, GSE securities identified in paragraph (a)(1)(iv) of this section): Residual maturity between one and five years .....	2.0
Eligible government and related debt (e.g., central bank, multilateral development bank, GSE securities identified in paragraph (a)(1)(iv) of this section): Residual maturity greater than five years .....	4.0
Eligible corporate debt (including eligible GSE debt securities not identified in paragraph (a)(1)(iv) of this section): Residual maturity less than one-year .....	1.0
Eligible corporate debt (including eligible GSE debt securities not identified in paragraph (a)(1)(iv) of this section): Residual maturity between one and five years .....	4.0
Eligible corporate debt (including eligible GSE debt securities not identified in paragraph (a)(1)(iv) of this section): Residual maturity greater than five years .....	8.0
Equities included in S&P 500 or related index .....	15.0
Equities included in S&P 1500 Composite or related index but not S&P 500 or related index .....	25.0
Gold .....	15.0
Additional (additive) haircut on asset in which the currency of the swap obligation differs from that of the collateral asset .....	8.0

(ii) The value of initial margin collateral shall be computed as the product of the cash or market value of the eligible collateral asset times one minus the applicable haircut expressed in percentage terms. The total value of all initial margin collateral is calculated as the sum of those values for each eligible collateral asset.

(b) *Variation margin*—(1) *Eligible collateral*—(i) *Swaps with a swap entity*. (A) A covered swap entity shall post and collect as variation margin to or from a counterparty that is a swap entity only immediately available cash funds that are denominated in: U.S. dollars;

(B) Another major currency; or

(C) The currency of settlement of the uncleared swap.

(ii) *Swaps with a financial end user*. A covered swap entity may post and collect as variation margin to or from a counterparty that is a financial end user any asset that is eligible to be

posted or collected as initial margin under paragraphs (a)(1) and (2) of this section.

(2) *Haircuts*. (i) The value of any eligible collateral collected or posted to satisfy variation margin requirements shall be subject to the sum of the following discounts, as applicable:

(A) An 8% discount for variation margin collateral denominated in a currency that is not the currency of settlement for the uncleared swap except for immediately available cash funds denominated in U.S. cash funds or another major currency; and

(B) The discounts for initial margin set forth in the table in paragraph (a)(3)(i)(B) of this section.

(ii) The value of variation margin collateral shall be computed as the product of the cash or market value of the eligible collateral asset times one minus the applicable haircut expressed in percentage terms. The total value of



all variation margin collateral shall be calculated as the sum of those values of each eligible collateral asset.

(c) *Monitoring obligation.* A covered swap entity shall monitor the market value and eligibility of all collateral collected and posted to satisfy the margin requirements of §§ 23.150 through 23.161. To the extent that the market value of such collateral has declined, the covered swap entity shall promptly collect or post such additional eligible collateral as is necessary to maintain compliance with the margin requirements of §§ 23.150 through 23.161. To the extent that the collateral is no longer eligible, the covered swap entity shall promptly collect or post sufficient eligible replacement collateral to comply with the margin requirements of §§ 23.150 through 23.161.

(d) *Excess margin.* A covered swap entity may collect or post initial margin or variation margin that is not required pursuant to §§ 23.150 through 23.161 in any form of collateral.

**§ 23.157 Custodial arrangements.**

(a) *Initial margin posted by covered swap entities.* Each covered swap entity that posts initial margin with respect to an uncleared swap shall require that all funds or other property that the covered swap entity provides as initial margin be held by one or more custodians that are not the covered swap entity, the counterparty, or margin affiliates of the covered swap entity or the counterparty.

(b) *Initial margin collected by covered swap entities.* Each covered swap entity that collects initial margin required by § 23.152 with respect to an uncleared swap shall require that such initial margin be held by one or more custodians that are not the covered swap entity, the counterparty, or margin affiliates of the covered swap entity or the counterparty.

(c) *Custodial agreement.* Each covered swap entity shall enter into an agreement with each custodian that holds funds pursuant to paragraphs (a) or (b) of this section that:

(1) Prohibits the custodian from rehypothecating, repledging, reusing, or otherwise transferring (through securities lending, securities borrowing, repurchase agreement, reverse repur-

chase agreement or other means) the collateral held by the custodian except that cash collateral may be held in a general deposit account with the custodian if the funds in the account are used to purchase an asset described in § 23.156(a)(1)(iv) through (xii), such asset is held in compliance with this section, and such purchase takes place within a time period reasonably necessary to consummate such purchase after the cash collateral is posted as initial margin; and

(2) Is a legal, valid, binding, and enforceable agreement under the laws of all relevant jurisdictions including in the event of bankruptcy, insolvency, or a similar proceeding.

(3) Notwithstanding paragraph (c)(1) of this section, a custody agreement may permit the posting party to substitute or direct any reinvestment of posted collateral held by the custodian, provided that, with respect to collateral posted or collected pursuant to § 23.152, the agreement requires the posting party, when it substitutes or directs the reinvestment of posted collateral held by the custodian.

(i) To substitute only funds or other property that would qualify as eligible collateral under § 23.156, and for which the amount net of applicable discounts described in § 23.156 would be sufficient to meet the requirements of § 23.152; and

(ii) To direct reinvestment of funds only in assets that would qualify as eligible collateral under § 23.156, and for which the amount net of applicable discounts described in § 23.156 would be sufficient to meet the requirements of § 23.152.

**§ 23.158 Margin documentation.**

(a) *General requirement.* Each covered swap entity shall execute documentation with each counterparty that complies with the requirements of § 23.504 and that complies with this section, as applicable. For uncleared swaps between a covered swap entity and a counterparty that is a swap entity or a financial end user, the documentation shall provide the covered swap entity with the contractual right and obligation to exchange initial margin and variation margin in such amounts, in

such form, and under such circumstances as are required by §§ 23.150 through 23.161.

(b) *Contents of the documentation.* The margin documentation shall:

(1) Specify the methods, procedures, rules, inputs, and data sources to be used for determining the value of uncleared swaps for purposes of calculating variation margin;

(2) Describe the methods, procedures, rules, inputs, and data sources to be used to calculate initial margin for uncleared swaps entered into between the covered swap entity and the counterparty; and

(3) Specify the procedures by which any disputes concerning the valuation of uncleared swaps, or the valuation of assets collected or posted as initial margin or variation margin may be resolved.

#### § 23.159 Special rules for affiliates.

(a) *Initial margin.* (1) Except as provided in paragraph (c) of this section, a covered swap entity shall not be required to collect initial margin from a margin affiliate provided that the covered swap entity meets the following conditions:

(i) The swaps are subject to a centralized risk management program that is reasonably designed to monitor and to manage the risks associated with the inter-affiliate swaps; and

(ii) The covered swap entity exchanges variation margin with the margin affiliate in accordance with paragraph (b) of this section.

(2)(i) A covered swap entity shall post initial margin to any margin affiliate that is a swap entity subject to the rules of a Prudential Regulator in an amount equal to the amount that the swap entity is required to collect from the covered swap entity pursuant to the rules of the Prudential Regulator.

(ii) A covered swap entity shall not be required to post initial margin to any other margin affiliate pursuant to §§ 23.150 through 23.161.

(b) *Variation margin.* Each covered swap entity shall post and collect variation margin with each margin affiliate that is a swap entity or a financial end user in accordance with all applicable provisions of §§ 23.150 through 23.161.

(c) *Foreign margin affiliates.* (1) For purposes of this section, the term outward facing margin affiliate means a margin affiliate that enters into swaps with third parties.

(2) Except as provided in paragraph (c)(3) of this section, each covered swap entity shall collect initial margin in accordance with all applicable provisions of §§ 23.150 through 23.161 from each margin affiliate that meets the following criteria:

(i) The margin affiliate is a financial end user;

(ii) The margin affiliate enters into swaps with third parties, or enters into swaps with any other margin affiliate that, directly or indirectly (including through a series of transactions), enters into swaps with third parties, for which the provisions of §§ 23.150 through 23.161 would apply if any such margin affiliate were a swap entity; and

(iii) Any such outward facing margin affiliate is located in a jurisdiction that the Commission has not found to be eligible for substituted compliance with regard to the provisions of §§ 23.150 through 23.161 and does not collect initial margin for such swaps in a manner that would comply with the provisions of §§ 23.150 through 23.161.

(3) The custodian for initial margin collected pursuant to paragraph (c)(1) of this section may be the covered swap entity or a margin affiliate of the covered swap entity.

#### § 23.160 [Reserved]

#### § 23.161 Compliance dates.

(a) Covered swap entities shall comply with the minimum margin requirements for uncleared swaps on or before the following dates for uncleared swaps entered into on or after the following dates:

(1) September 1, 2016 for the requirements in § 23.152 for initial margin and in § 23.153 for variation margin for any uncleared swaps where both—

(i) The covered swap entity combined with all its margin affiliates; and

(ii) Its counterparty combined with all its margin affiliates, have an average daily aggregate notional amount of uncleared swaps, uncleared security-

based swaps, foreign exchange forwards, and foreign exchange swaps in March, April, and May 2016 that exceeds \$3 trillion, where such amounts are calculated only for business days; and where

(iii) In calculating the amounts in paragraphs (a)(1)(i) and (ii) of this section, an entity shall count the average daily notional amount of an uncleared swap, an uncleared security-based swap, a foreign-exchange forward, or a foreign exchange swap between an entity or a margin affiliate only one time and shall not count a swap or a security-based swap that is exempt pursuant to § 23.150(b) or a security-based swap that is exempt pursuant to section 15F(e) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–10(e)).

(2) March 1, 2017 for the requirements in § 23.153 for variation margin for any other covered swap entity for uncleared swaps entered into with any other counterparty.

(3) September 1, 2017 for the requirements in § 23.152 for initial margin for any uncleared swaps where both—

(i) The covered swap entity combined with all its margin affiliates; and

(ii) Its counterparty combined with all its margin affiliates, have an average daily aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards, and foreign exchange swaps in March, April, and May 2017 that exceeds \$2.25 trillion, where such amounts are calculated only for business days; and where

(iii) In calculating the amounts in paragraphs (a)(3)(i) and (ii) of this section, an entity shall count the average daily notional amount of an uncleared swap, an uncleared security-based swap, a foreign-exchange forward, or a foreign exchange swap between an entity or a margin affiliate only one time and shall not count a swap or a security-based swap that is exempt pursuant to § 23.150(b) or a security-based swap that is exempt pursuant to section 15F(e) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–10(e)).

(4) September 1, 2018, for the requirements in § 23.152 for initial margin for any uncleared swaps where both—

(i) The covered swap entity combined with all its margin affiliates; and

(ii) Its counterparty combined with all its margin affiliates have an average daily aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards, and foreign exchange swaps in March, April, and May 2018 that exceeds \$1.5 trillion, where such amounts are calculated only for business days; and where

(iii) In calculating the amounts in paragraphs (a)(4)(i) and (ii) of this section, an entity shall count the average daily notional amount of an uncleared swap, an uncleared security-based swap, a foreign-exchange forward, or a foreign exchange swap between an entity or a margin affiliate only one time and shall not count a swap or a security-based swap that is exempt pursuant to § 23.150(b) or a security-based swap that is exempt pursuant to section 15F(e) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–10(e)).

(5) September 1, 2019 for the requirements in § 23.152 for initial margin for any uncleared swaps where both—

(i) The covered swap entity combined with all its margin affiliates; and

(ii) Its counterparty combined with all its margin affiliates have an average daily aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards, and foreign exchange swaps in March, April, and May 2019 that exceeds \$0.75 trillion, where such amounts are calculated only for business days; and where

(iii) In calculating the amounts in paragraphs (a)(5)(i) and (ii) of this section, an entity shall count the average daily notional amount of an uncleared swap, an uncleared security-based swap, a foreign-exchange forward, or a foreign exchange swap between an entity or a margin affiliate only one time and shall not count a swap or a security-based swap that is exempt pursuant to § 23.150(b) or a security-based swap that is exempt pursuant to section 15F(e) of the Securities Exchange Act of 1934 (15 U.S.C. 78o–10(e)).

(6) September 1, 2020 for the requirements in § 23.152 for initial margin for any other covered swap entity with respect to uncleared swaps entered into with any other counterparty.

(b) Once a covered swap entity and its counterparty must comply with the margin requirements for uncleared swaps based on the compliance dates in paragraph (a) of this section, the covered swap entity and its counterparty shall remain subject to the requirements of §§ 23.150 through 23.161 with respect to that counterparty.

(c)(1) If a covered swap entity's counterparty changes its status such that an uncleared swap with that counterparty becomes subject to a stricter margin requirement under §§ 23.150 through 23.161 (for example, if the counterparty's status changes from a financial end user without material swaps exposure to a financial end user with material swaps exposure), then the covered swap entity shall comply with the stricter margin requirements for any uncleared swaps entered into with that counterparty after the counterparty changes its status.

(2) If a covered swap entity's counterparty changes its status such that an uncleared swap with that counterparty becomes subject to less strict margin requirement under §§ 23.150 through 23.161 (for example, if the counterparty's status changes from a financial end user with material swaps exposure to a financial end user without material swaps exposure), then the covered swap entity may comply with the less strict margin requirements for any uncleared swaps entered into with that counterparty after the counterparty changes its status as well as for any outstanding uncleared swap entered into after the applicable compliance date under paragraph (a) of this section and before the counterparty changed its status.

§§ 23.162–23.199 [Reserved]

#### **Subpart F—Reporting, Record-keeping, and Daily Trading Records Requirements for Swap Dealers and Major Swap Participants**

SOURCE: 77 FR 20202, Apr. 3, 2012, unless otherwise noted.

#### **§ 23.200 Definitions.**

For purposes of subpart F, the following terms shall be defined as provided.

(a) *Business trading unit* means any department, division, group, or personnel of a swap dealer or major swap participant or any of its affiliates, whether or not identified as such, that performs, or exercises supervisory authority over the performance of, any pricing (excluding price verification for risk management purposes), trading, sales, purchasing, marketing, advertising, solicitation, structuring, or brokerage activities on behalf of a registrant.

(b) *Clearing unit* means any department, division, group, or personnel of a registrant or any of its affiliates, whether or not identified as such, that performs any proprietary or customer clearing activities on behalf of a registrant.

(c) *Complaint* means any formal or informal complaint, grievance, criticism, or concern communicated to the swap dealer or major swap participant in any format relating to, arising from, or in connection with, any trading conduct or behavior or with the swap dealer or major swap participant's performance (or failure to perform) any of its regulatory obligations, and includes any and all observations, comments, remarks, interpretations, clarifications, notes, and examinations as to such conduct or behavior communicated or documented by the complainant, swap dealer, or major swap participant.

(d) *Executed* means the completion of the execution process.

(e) *Execution* means, with respect to a swap, an agreement by the parties (whether orally, in writing, electronically, or otherwise) to the terms of a swap that legally binds the parties to such swap terms under applicable law.

(f) *Governing body*. This term means:

- (1) A board of directors;
- (2) A body performing a function similar to a board of directors;
- (3) Any committee of a board or body; or
- (4) The chief executive officer of a registrant, or any such board, body, committee, or officer of a division of a

registrant, provided that the registrant's swaps activities for which registration with the Commission is required are wholly contained in a separately identifiable division.

(g) *Prudential regulator* has the meaning given to such term in section 1a(39) of the Commodity Exchange Act and includes the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Association, and the Federal Housing Finance Agency, as applicable to the swap dealer or major swap participant.

(h) *Registered entity* has the meaning given to such term in section 1a(40) of the Commodity Exchange Act, and includes boards of trade designated as contract markets, derivatives clearing organizations, swap execution facilities, and swap data repositories.

(i) *Related cash or forward transaction* means a purchase or sale for immediate or deferred physical shipment or delivery of an asset related to a swap where the swap and the related cash or forward transaction are used to hedge, mitigate the risk of, or offset one another.

(j) *Swaps activities* means, with respect to a registrant, such registrant's activities related to swaps and any product used to hedge such swaps, including, but not limited to, futures, options, other swaps or security-based swaps, debt or equity securities, foreign currency, physical commodities, and other derivatives.

(k) *Swap confirmation* means the consummation (electronically or otherwise) of legally binding documentation (electronic or otherwise) that memorializes the agreement of the parties to all the terms of the swap. A confirmation must be in writing (whether electronic or otherwise) and must legally supersede any previous agreement (electronically or otherwise).

**§ 23.201 Required records.**

(a) *Transaction and position records.* Each swap dealer and major swap participant shall keep full, complete, and systematic records, together with all pertinent data and memoranda, of all its swaps activities. Such records shall include:

(1) *Transaction records.* Records of each transaction, including all documents on which transaction information is originally recorded. Such records shall be kept in a form and manner identifiable and searchable by transaction and by counterparty, and shall include:

(i) All documents customarily generated in accordance with market practice that demonstrate the existence and nature of an order or transaction, including, but not limited to, records of all orders (filled, unfilled, or cancelled); correspondence; journals; memoranda; ledgers; confirmations; risk disclosure documents; statements of purchase and sale; contracts; invoices; warehouse receipts; documents of title; and

(ii) The daily trading records required to be kept in accordance with § 23.202.

(2) *Position records.* Records of each position held by each swap dealer and major swap participant, identified by product and counterparty, including records reflecting whether each position is "long" or "short" and whether the position is cleared. Position records shall be linked to transaction records in a manner that permits identification of the transactions that established the position.

(3) *Records of transactions executed on a swap execution facility or designated contract market or cleared by a derivatives clearing organization.* Records of each transaction executed on a swap execution facility or designated contract market or cleared by a derivatives clearing organization maintained in compliance with the Act and Commission regulations.

(b) *Business records.* Each swap dealer and major swap participant shall keep full, complete, and systematic records of all activities related to its business as a swap dealer or major swap participant, including but not limited to:

(1) *Governance.* (i) Minutes of meetings of the governing body and relevant committee minutes, including handouts and presentation materials;

(ii) Organizational charts for its governing body and relevant committees, business trading unit, clearing unit, risk management unit, and all other relevant units or divisions;

(iii) Biographies or resumes of managers, senior supervisors, officers, and directors;

(iv) Job descriptions for manager, senior supervisor, officer, and director positions, including job responsibilities and scope of authority;

(v) Internal and external audit, risk management, compliance, and consultant reports (including management responses); and

(vi) Business and strategic plans for the business trading unit.

(2) *Financial records.* (i) Records reflecting all assets and liabilities, income and expenses, and capital accounts as required by the Act and Commission regulations; and

(ii) All other financial records required to be kept under the Act and Commission regulations.

(3) *Complaints.* (i) A record of each complaint received by the swap dealer or major swap participant concerning any partner, member, officer, employee, or agent. The record shall include the complainant's name, address, and account number; the date the complaint was received; the name of all persons identified in the complaint; a description of the nature of the complaint; the disposition of the complaint, and the date the complaint was resolved.

(ii) A record indicating that each counterparty of the swap dealer or major swap participant has been provided with a notice containing the physical address, email or other widely available electronic address, and telephone number of the department of the swap dealer or major swap participant to which any complaints may be directed.

(4) *Marketing and sales materials.* All marketing and sales presentations, advertisements, literature, and communications, and a record documenting that the swap dealer or major swap participant has complied with, or adopted policies and procedures reasonably designed to establish compliance with, all applicable Federal requirements, Commission regulations, and the rules of any self-regulatory organization of which the swap dealer or major swap participant is a member.

(c) *Records of data reported to a swap data repository.* With respect to each

swap, each swap dealer and major swap participant shall identify, retain, and produce for inspection all information and data required to be reported in accordance with part 45 of this chapter, along with a record of the date and time the swap dealer or major swap participant made the report.

(d) *Records of real-time reporting data.* Each swap dealer and major swap participant shall identify, retain, and produce for inspection all information and data required to be reported in accordance with part 43 of this chapter, along with a record of the date and time the swap dealer or major swap participant made the report.

#### § 23.202 Daily trading records.

(a) *Daily trading records for swaps.* Each swap dealer and major swap participant shall make and keep daily trading records of all swaps it executes, including all documents on which transaction information is originally recorded. Each swap dealer and major swap participant shall ensure that its records include all information necessary to conduct a comprehensive and accurate trade reconstruction for each swap. Each swap dealer and major swap participant shall maintain each transaction record in a manner identifiable and searchable by transaction and counterparty.

(1) *Pre-execution trade information.* Each swap dealer and major swap participant shall make and keep pre-execution trade information, including, at a minimum, records of all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of a swap, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media. Such records shall include, but are not limited to:

(i) Reliable timing data for the initiation of the trade that would permit complete and accurate trade reconstruction; and

(ii) A record of the date and time, to the nearest minute, using Coordinated Universal Time (UTC), by timestamp or other timing device, for each

quotation provided to, or received from, the counterparty prior to execution.

(2) *Execution trade information.* Each swap dealer and major swap participant shall make and keep trade execution records, including:

(i) All terms of each swap, including all terms regarding payment or settlement instructions, initial and variation margin requirements, option premiums, payment dates, and any other cash flows;

(ii) The trade ticket for each swap (which, together with the time of execution of each swap, shall be immediately recorded electronically for further processing);

(iii) The unique swap identifier, as required by § 45.4(a), for each swap;

(iv) A record of the date and time of execution of each swap, to the nearest minute, using Coordinated Universal Time (UTC), by timestamp or other timing device;

(v) The name of the counterparty with which each such swap was executed, including its unique counterparty identifier, as required by § 45.4(b);

(vi) The date and title of the agreement to which each swap is subject, including but not limited to, any swap trading relationship documentation and credit support arrangements;

(vii) The product name of each swap, including its unique product identifier, as required by § 45.4(c);

(viii) The price at which the swap was executed;

(ix) Fees or commissions and other expenses, identified by transaction; and

(x) Any other information relevant to the swap.

(3) *Post-execution trade information.* Each swap dealer and major swap participant shall make and keep records of post-execution trade information containing an itemized record of all relevant post-trade processing and events.

(i) Records of post-trade processing and events shall include all of the following, as applicable:

- (A) Confirmation;
- (B) Termination;
- (C) Novation;
- (D) Amendment;
- (E) Assignment;
- (F) Netting;

(G) Compression;

(H) Reconciliation;

(I) Valuation;

(J) Margining;

(K) Collateralization; and

(L) Central clearing.

(ii) Each swap dealer and major swap participant shall make and keep a record of all swap confirmations, along with the date and time, to the nearest minute, using Coordinated Universal Time (UTC), by timestamp or other timing device; and

(iii) Each swap dealer and major swap participant shall make and keep a record of each swap portfolio reconciliation, including the number of portfolio reconciliation discrepancies and the number of swap valuation disputes (including the time-to-resolution of each valuation dispute and the age of outstanding valuation disputes, categorized by transaction and counterparty);

(iv) Each swap dealer and major swap participant shall make and keep a record of each swap portfolio compression exercise in which it participates, including the dates of the compression, the swaps included in the compression, the identity of the counterparties participating in the exercise, the results of the compression, and the name of the third-party entity performing the compression, if any; and

(v) Each swap dealer and major swap participant shall make and keep a record of each swap that it centrally clears, categorized by transaction and counterparty.

(4) *Ledgers.* Each swap dealer and major swap participant shall make and keep ledgers (or other records) reflecting the following:

(i) Payments and interest received;

(ii) Moneys borrowed and moneys loaned;

(iii) The daily calculation of the value of each outstanding swap;

(iv) The daily calculation of current and potential future exposure for each counterparty;

(v) The daily calculation of initial margin to be posted by the swap dealer or major swap participant for each counterparty and the daily calculation of initial margin to be posted by each counterparty;

(vi) The daily calculation of variation margin payable to or receivable from each counterparty;

(vii) The daily calculation of the value of all collateral, before and after haircuts, held by or posted by the swap dealer or major swap participant;

(viii) All transfers of collateral, including any substitutions of collateral, identifying in sufficient detail the amounts and types of collateral transferred; and

(ix) All charges against and credits to each counterparty's account, including funds deposited, withdrawn, or transferred, and charges or credits resulting from losses or gains on transactions.

(b) *Daily trading records for related cash and forward transactions.* Each swap dealer and major swap participant shall make and keep daily trading records of all related cash or forward transactions it executes, including all documents on which the related cash or forward transaction information is originally recorded. Each swap dealer and major swap participant shall ensure that its records include all information necessary to conduct a comprehensive and accurate trade reconstruction for each related cash or forward transaction. Each swap dealer and major swap participant shall maintain each transaction record in a manner identifiable and searchable by transaction and by counterparty. Such records shall include, but are not limited to:

(1) A record of all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the conclusion of a related cash or forward transaction, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media;

(2) Reliable timing data for the initiation of the transaction that would permit complete and accurate trade reconstruction;

(3) A record of the date and time, to the nearest minute, using Coordinated Universal Time (UTC), by timestamp or other timing device, for each quotation provided to, or received

from, the counterparty prior to execution;

(4) A record of the date and time of execution of each related cash or forward transaction, to the nearest minute, using Coordinated Universal Time (UTC), by timestamp or other timing device;

(5) All terms of each related cash or forward transaction;

(6) The price at which the related cash or forward transaction was executed; and

(7) A record of the daily calculation of the value of the related cash or forward transaction and any other relevant financial information.

#### § 23.203 Records; retention and inspection.

(a) *Location of records*—(1) *Records.* All records required to be kept by a swap dealer or major swap participant by the Act and by Commission regulations shall be kept at the principal place of business of the swap dealer or major swap participant or such other principal office as shall be designated by the swap dealer or major swap participant. If the principal place of business is outside of the United States, its territories or possessions, then upon the request of a Commission representative, the swap dealer or major swap participant must provide such records as requested at the place in the United States, its territories, or possessions designated by the representative within 72 hours after receiving the request.

(2) *Contact information.* Each swap dealer and major swap participant shall maintain for each of its offices a listing, by name or title, of each person at that office who, without delay, can explain the types of records the swap dealer or major swap participant maintains at that office and the information contained in those records.

(b) *Record retention.* (1) The records required to be maintained by this chapter shall be maintained in accordance with the provisions of § 1.31, except as provided in paragraphs (b)(2) and (3) of this section. All records required to be kept by the Act and by Commission regulations shall be kept for a period of five years from the date the record was made and shall be readily accessible during the first two (2) years of the



## § 23.204

five-year period. All such records shall be open to inspection by any representative of the Commission, the United States Department of Justice, or any applicable prudential regulator. Records relating to swaps defined in section 1a(47)(A)(v) shall be open to inspection by any representative of the Commission, the United States Department of Justice, the Securities and Exchange Commission, or any applicable prudential regulator.

(2) Records of any swap or related cash or forward transaction shall be kept until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction, and for a period of five years after such date. Such records shall be readily accessible until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction and during the first two years of the 5-year period following such date. Provided, however, that records of oral communications communicated by telephone, voicemail, mobile device, or other digital or electronic media pursuant to § 23.202(a)(1) and (b)(1) shall be kept for a period of one year. All such records shall be open to inspection by any representative of the Commission, the United States Department of Justice, or any applicable prudential regulator. Records relating to swaps defined in section 1a(47)(A)(v) shall be open to inspection by any representative of the Commission, the United States Department of Justice, the Securities and Exchange Commission, or any applicable prudential regulator.

(3) Records of any swap data reported in accordance with part 45 of this chapter shall be maintained in accordance with the requirements of § 45.2 of this chapter.

## § 23.204 Reports to swap data repositories.

(a) *Reporting of swap transaction data to swap data repositories.* Each swap dealer and major swap participant shall report all information and data in accordance with part 45 of this chapter.

(b) *Electronic reporting of swap transaction data.* Each swap dealer and major swap participant shall have the electronic systems and procedures necessary to transmit electronically all

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information and data required to be reported in accordance with part 45 of this chapter.

## § 23.205 Real-time public reporting.

(a) *Real-time public reporting of swap transaction and pricing data.* Each swap dealer and major swap participant shall report all information and swap transaction and pricing data required to be reported in accordance with the real-time public recording requirements in part 43 of this chapter.

(b) *Electronic reporting of swap transaction data.* Each swap dealer and major swap participant shall have the electronic systems and procedures necessary to transmit electronically all information and data required to be reported in accordance with part 43 of this chapter.

## § 23.206 Delegation of authority to the Director of the Division of Swap Dealer and Intermediary Oversight to establish an alternative compliance schedule to comply with daily trading records.

(a) The Commission hereby delegates to the Director of the Division of Swap Dealer and Intermediary Oversight or such other employee or employees as the Director may designate from time to time, the authority to establish an alternative compliance schedule for requirements of § 23.202 that are found to be technologically or economically impracticable for an affected swap dealer or major swap participant that seeks, in good faith, to comply with the requirements of § 23.202 within a reasonable time period beyond the date on which compliance by such swap dealer or major swap participant is otherwise required.

(b) A request for an alternative compliance schedule under this section shall be acted upon by the Director of the Division of Swap Dealer and Intermediary Oversight within 30 days from the time such a request is received, or it shall be deemed approved.

(c) Relief granted under this section shall not cause a registrant to be out of compliance or deemed in violation of any registration requirements.

(d) Notwithstanding any other provision of this section, in any case in

which a Commission employee delegated authority under this section believes it appropriate, he or she may submit to the Commission for its consideration the question of whether an alternative compliance schedule should be established. Nothing in this section shall be deemed to prohibit the Commission, at its election, from exercising the authority delegated in this section.

**Subpart H—Business Conduct Standards for Swap Dealers and Major Swap Participants Dealing With Counterparties, Including Special Entities**

SOURCE: 77 FR 9822, Feb. 17, 2012, unless otherwise noted.

**§ 23.400 Scope.**

The sections of this subpart shall apply to swap dealers and, unless otherwise indicated, major swap participants. These rules are not intended to limit or restrict the applicability of other provisions of the Act and rules and regulations thereunder, or other applicable laws, rules and regulations. The provisions of this subpart shall apply in connection with transactions in swaps as well as in connection with swaps that are offered but not entered into.

**§ 23.401 Definitions.**

(a) *Counterparty.* The term “counterparty,” as appropriate in this subpart, includes any person who is a prospective counterparty to a swap.

(b) *Major swap participant.* The term “major swap participant” means any person defined in Section 1a(33) of the Act and §1.3 of this chapter and, as appropriate in this subpart, any person acting for or on behalf of a major swap participant, including an associated person defined in Section 1a(4) of the Act.

(c) *Special Entity.* The term “Special Entity” means:

- (1) A Federal agency;
- (2) A State, State agency, city, county, municipality, other political subdivision of a State, or any instrumentality, department, or a corporation of

or established by a State or political subdivision of a State;

(3) Any employee benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

(4) Any governmental plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

(5) Any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)); or

(6) Any employee benefit plan defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002), not otherwise defined as a Special Entity, that elects to be a Special Entity by notifying a swap dealer or major swap participant of its election prior to entering into a swap with the particular swap dealer or major swap participant.

(d) *Swap dealer.* The term “swap dealer” means any person defined in Section 1a(49) of the Act and §1.3 of this chapter and, as appropriate in this subpart, any person acting for or on behalf of a swap dealer, including an associated person defined in Section 1a(4) of the Act.

**§ 23.402 General provisions.**

(a) *Policies and procedures to ensure compliance and prevent evasion.* (1) Swap dealers and major swap participants shall have written policies and procedures reasonably designed to:

- (i) Ensure compliance with the requirements of this subpart; and
- (ii) Prevent a swap dealer or major swap participant from evading or participating in or facilitating an evasion of any provision of the Act or any regulation promulgated thereunder.

(2) Swap dealers and major swap participants shall implement and monitor compliance with such policies and procedures as part of their supervision and risk management requirements specified in subpart J of this part.

(b) *Know your counterparty.* Each swap dealer shall implement policies and procedures reasonably designed to obtain and retain a record of the essential facts concerning each counterparty whose identity is known to the swap

dealer prior to the execution of the transaction that are necessary for conducting business with such counterparty. For purposes of this section, the essential facts concerning a counterparty are:

(1) Facts required to comply with applicable laws, regulations and rules;

(2) Facts required to implement the swap dealer's credit and operational risk management policies in connection with transactions entered into with such counterparty; and

(3) Information regarding the authority of any person acting for such counterparty.

(c) *True name and owner.* Each swap dealer or major swap participant shall obtain and retain a record which shall show the true name and address of each counterparty whose identity is known to the swap dealer or major swap participant prior to the execution of the transaction, the principal occupation or business of such counterparty as well as the name and address of any other person guaranteeing the performance of such counterparty and any person exercising any control with respect to the positions of such counterparty.

(d) *Reasonable reliance on representations.* A swap dealer or major swap participant may rely on the written representations of a counterparty to satisfy its due diligence requirements under this subpart, unless it has information that would cause a reasonable person to question the accuracy of the representation. If agreed to by the counterparties, such representations may be contained in counterparty relationship documentation and may satisfy the relevant requirements of this subpart for subsequent swaps offered to or entered into with a counterparty, provided however, that such counterparty undertakes to timely update any material changes to the representations.

(e) *Manner of disclosure.* A swap dealer or major swap participant may provide the information required by this subpart by any reliable means agreed to in writing by the counterparty; provided however, for transactions initiated on a designated contract market or swap execution facility, written agreement by the counterparty regard-

ing the reliable means of disclosure is not required.

(f) *Disclosures in a standard format.* If agreed to by a counterparty, the disclosure of material information that is applicable to multiple swaps between a swap dealer or major swap participant and a counterparty may be made in counterparty relationship documentation or other written agreement between the counterparties.

(g) *Record retention.* Swap dealers and major swap participants shall create a record of their compliance with the requirements of this subpart and shall retain records in accordance with subpart F of this part and §1.31 of this chapter and make them available to applicable prudential regulators upon request.

§§ 23.403–23.409 [Reserved]

**§ 23.410 Prohibition on fraud, manipulation, and other abusive practices.**

(a) It shall be unlawful for a swap dealer or major swap participant—

(1) To employ any device, scheme, or artifice to defraud any Special Entity or prospective customer who is a Special Entity;

(2) To engage in any transaction, practice, or course of business that operates as a fraud or deceit on any Special Entity or prospective customer who is a Special Entity; or

(3) To engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.

(b) *Affirmative defense.* It shall be an affirmative defense to an alleged violation of paragraph (a)(2) or (3) of this section for failure to comply with any requirement in this subpart if a swap dealer or major swap participant establishes that the swap dealer or major swap participant:

(1) Did not act intentionally or recklessly in connection with such alleged violation; and

(2) Complied in good faith with written policies and procedures reasonably designed to meet the particular requirement that is the basis for the alleged violation.

(c) *Confidential treatment of counterparty information.* (1) It shall be unlawful for any swap dealer or major swap participant to:

(i) Disclose to any other person any material confidential information provided by or on behalf of a counterparty to the swap dealer or major swap participant; or

(ii) Use for its own purposes in any way that would tend to be materially adverse to the interests of a counterparty, any material confidential information provided by or on behalf of a counterparty to the swap dealer or major swap participant.

(2) Notwithstanding paragraph (c)(1) of this section, a swap dealer or major swap participant may disclose or use material confidential information provided by or on behalf of a counterparty to the swap dealer or major swap participant if such disclosure or use is authorized in writing by the counterparty, or is necessary:

(i) For the effective execution of any swap for or with the counterparty;

(ii) To hedge or mitigate any exposure created by such swap; or

(iii) To comply with a request of the Commission, Department of Justice, any self-regulatory organization designated by the Commission, or an applicable prudential regulator, or is otherwise required by law.

(3) Each swap dealer or major swap participant shall implement written policies and procedures reasonably designed to protect material confidential information provided by or on behalf of a counterparty from disclosure and use in violation of this section by any person acting for or on behalf of the swap dealer or major swap participant.

#### §§ 23.411–23.429 [Reserved]

#### § 23.430 Verification of counterparty eligibility.

(a) *Eligibility.* A swap dealer or major swap participant shall verify that a counterparty meets the eligibility standards for an eligible contract participant, as defined in Section 1a(18) of the Act and § 1.3 of this chapter, before offering to enter into or entering into a swap with that counterparty.

(b) *Special Entity.* In verifying the eligibility of a counterparty pursuant to paragraph (a) of this section, a swap dealer or major swap participant shall also verify whether the counterparty is a Special Entity.

(c) *Special Entity election.* In verifying the eligibility of a counterparty pursuant to paragraph (a) of this section, a swap dealer or major swap participant shall verify whether a counterparty is eligible to elect to be a Special Entity under § 23.401(c)(6) and, if so, notify such counterparty of its right to make such an election.

(d) *Safe harbor.* A swap dealer or major swap participant may rely on written representations of a counterparty to satisfy the requirements of this section as provided in § 23.402(d). A swap dealer or major swap participant will have a reasonable basis to rely on such written representations for purposes of the requirements in paragraphs (a) and (b) of this section if the counterparty specifies in such representations the provision(s) of Section 1a(18) of the Act or paragraph(s) of § 1.3 of this chapter that describe its status as an eligible contract participant and, in the case of a Special Entity, the paragraph(s) of the Special Entity definition in § 23.401(c) that define its status as a Special Entity.

(e) This section shall not apply with respect to:

(1) A transaction that is initiated on a designated contract market; or

(2) A transaction initiated on a swap execution facility, if the swap dealer or major swap participant does not know the identity of the counterparty to the transaction prior to execution.

#### § 23.431 Disclosures of material information.

(a) At a reasonably sufficient time prior to entering into a swap, a swap dealer or major swap participant shall disclose to any counterparty to the swap (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) material information concerning the swap in a manner reasonably designed to allow the counterparty to assess:

(1) The material risks of the particular swap, which may include market, credit, liquidity, foreign currency, legal, operational, and any other applicable risks;

(2) The material characteristics of the particular swap, which shall include the material economic terms of

the swap, the terms relating to the operation of the swap, and the rights and obligations of the parties during the term of the swap; and

(3) The material incentives and conflicts of interest that the swap dealer or major swap participant may have in connection with a particular swap, which shall include:

(i) With respect to disclosure of the price of the swap, the price of the swap and the mid-market mark of the swap as set forth in paragraph (d)(2) of this section; and

(ii) Any compensation or other incentive from any source other than the counterparty that the swap dealer or major swap participant may receive in connection with the swap.

(b) *Scenario Analysis.* Prior to entering into a swap with a counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) that is not made available for trading, as provided in Section 2(h)(8) of the Act, on a designated contract market or swap execution facility, a swap dealer shall:

(1) Notify the counterparty that it can request and consult on the design of a scenario analysis to allow the counterparty to assess its potential exposure in connection with the swap;

(2) Upon request of the counterparty, provide a scenario analysis, which is designed in consultation with the counterparty and done over a range of assumptions, including severe downside stress scenarios that would result in a significant loss;

(3) Disclose all material assumptions and explain the calculation methodologies used to perform any requested scenario analysis; provided however, that the swap dealer is not required to disclose confidential, proprietary information about any model it may use to prepare the scenario analysis; and

(4) In designing any requested scenario analysis, consider any relevant analyses that the swap dealer undertakes for its own risk management purposes, including analyses performed as part of its “New Product Policy” specified in § 23.600(c)(3).

(c) Paragraphs (a) and (b) of this section shall not apply with respect to a transaction that is:

(1) Initiated on a designated contract market or a swap execution facility; and

(2) One in which the swap dealer or major swap participant does not know the identity of the counterparty to the transaction prior to execution.

(d) *Daily mark.* A swap dealer or major swap participant shall:

(1) For cleared swaps, notify a counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) of the counterparty’s right to receive, upon request, the daily mark from the appropriate derivatives clearing organization.

(2) For uncleared swaps, provide the counterparty (other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant) with a daily mark, which shall be the mid-market mark of the swap. The mid-market mark of the swap shall not include amounts for profit, credit reserve, hedging, funding, liquidity, or any other costs or adjustments. The daily mark shall be provided to the counterparty during the term of the swap as of the close of business or such other time as the parties agree in writing.

(3) For uncleared swaps, disclose to the counterparty:

(i) The methodology and assumptions used to prepare the daily mark and any material changes during the term of the swap; provided however, that the swap dealer or major swap participant is not required to disclose to the counterparty confidential, proprietary information about any model it may use to prepare the daily mark; and

(ii) Additional information concerning the daily mark to ensure a fair and balanced communication, including, as appropriate, that:

(A) The daily mark may not necessarily be a price at which either the counterparty or the swap dealer or major swap participant would agree to replace or terminate the swap;

(B) Depending upon the agreement of the parties, calls for margin may be based on considerations other than the daily mark provided to the counterparty; and

(C) The daily mark may not necessarily be the value of the swap that is marked on the books of the swap dealer or major swap participant.

**§ 23.432 Clearing disclosures.**

(a) *For swaps required to be cleared—right to select derivatives clearing organization.* A swap dealer or major swap participant shall notify any counterparty (other than a swap dealer, major swap participant, securities-based swap dealer, or major securities-based swap participant) with which it entered into a swap that is subject to mandatory clearing under Section 2(h) of the Act, that the counterparty has the sole right to select the derivatives clearing organization at which the swap will be cleared.

(b) *For swaps not required to be cleared—right to clearing.* A swap dealer or major swap participant shall notify any counterparty (other than a swap dealer, major swap participant, securities-based swap dealer, or major securities-based swap participant) with which it entered into a swap that is not subject to the mandatory clearing requirements under Section 2(h) of the Act that the counterparty:

(1) May elect to require clearing of the swap; and

(2) Shall have the sole right to select the derivatives clearing organization at which the swap will be cleared.

**§ 23.433 Communications—fair dealing.**

With respect to any communication between a swap dealer or major swap participant and any counterparty, the swap dealer or major swap participant shall communicate in a fair and balanced manner based on principles of fair dealing and good faith.

**§ 23.434 Recommendations to counterparties—institutional suitability.**

(a) A swap dealer that recommends a swap or trading strategy involving a swap to a counterparty, other than a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant, must:

(1) Undertake reasonable diligence to understand the potential risks and rewards associated with the recommended swap or trading strategy involving a swap; and

(2) Have a reasonable basis to believe that the recommended swap or trading strategy involving a swap is suitable for the counterparty. To establish a reasonable basis for a recommendation, a swap dealer must have or obtain information about the counterparty, including the counterparty's investment profile, trading objectives, and ability to absorb potential losses associated with the recommended swap or trading strategy involving a swap.

(b) *Safe harbor.* A swap dealer may fulfill its obligations under paragraph (a)(2) of this section with respect to a particular counterparty if:

(1) The swap dealer reasonably determines that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks with regard to the relevant swap or trading strategy involving a swap;

(2) The counterparty or its agent represents in writing that it is exercising independent judgment in evaluating the recommendations of the swap dealer with regard to the relevant swap or trading strategy involving a swap;

(3) The swap dealer discloses in writing that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the swap or trading strategy involving a swap for the counterparty; and

(4) In the case of a counterparty that is a Special Entity, the swap dealer complies with § 23.440 where the recommendation would cause the swap dealer to act as an advisor to a Special Entity within the meaning of § 23.440(a).

(c) A swap dealer will satisfy the requirements of paragraph (b)(1) of this section if it receives written representations, as provided in § 23.402(d), that:

(1) In the case of a counterparty that is not a Special Entity, the counterparty has complied in good faith with written policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so; or

(2) In the case of a counterparty that is a Special Entity, satisfy the terms of the safe harbor in § 23.450(d).

**§§ 23.435–23.439 [Reserved]**

**§ 23.440 Requirements for swap dealers acting as advisors to Special Entities.**

(a) *Acts as an advisor to a Special Entity.* For purposes of this section, a swap dealer “acts as an advisor to a Special Entity” when the swap dealer recommends a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity.

(b) *Safe harbors.* A swap dealer will not “act as an advisor to a Special Entity” within the meaning of paragraph (a) of this section if:

(1) With respect to a Special Entity that is an employee benefit plan as defined in § 23.401(c)(3):

(i) The Special Entity represents in writing that it has a fiduciary as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) that is responsible for representing the Special Entity in connection with the swap transaction;

(ii) The fiduciary represents in writing that it will not rely on recommendations provided by the swap dealer; and

(iii) The Special Entity represents in writing:

(A) That it will comply in good faith with written policies and procedures reasonably designed to ensure that any recommendation the Special Entity receives from the swap dealer materially affecting a swap transaction is evaluated by a fiduciary before the transaction occurs; or

(B) That any recommendation the Special Entity receives from the swap dealer materially affecting a swap transaction will be evaluated by a fiduciary before that transaction occurs; or

(2) With respect to any Special Entity:

(i) The swap dealer does not express an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity;

(ii) The Special Entity represents in writing that:

(A) The Special Entity will not rely on recommendations provided by the swap dealer; and

(B) The Special Entity will rely on advice from a qualified independent representative within the meaning of § 23.450; and

(iii) The swap dealer discloses to the Special Entity that it is not undertaking to act in the best interests of the Special Entity as otherwise required by this section.

(c) A swap dealer that acts as an advisor to a Special Entity shall comply with the following requirements:

(1) *Duty.* Any swap dealer that acts as an advisor to a Special Entity shall have a duty to make a reasonable determination that any swap or trading strategy involving a swap recommended by the swap dealer is in the best interests of the Special Entity.

(2) *Reasonable efforts.* Any swap dealer that acts as an advisor to a Special Entity shall make reasonable efforts to obtain such information as is necessary to make a reasonable determination that any swap or trading strategy involving a swap recommended by the swap dealer is in the best interests of the Special Entity, including information relating to:

(i) The financial status of the Special Entity, as well as the Special Entity’s future funding needs;

(ii) The tax status of the Special Entity;

(iii) The hedging, investment, financing, or other objectives of the Special Entity;

(iv) The experience of the Special Entity with respect to entering into swaps, generally, and swaps of the type and complexity being recommended;

(v) Whether the Special Entity has the financial capability to withstand changes in market conditions during the term of the swap; and

(vi) Such other information as is relevant to the particular facts and circumstances of the Special Entity, market conditions, and the type of swap or trading strategy involving a swap being recommended.

(d) *Reasonable reliance on representations of the Special Entity.* As provided in § 23.402(d), the swap dealer may rely

on written representations of the Special Entity to satisfy its requirement in paragraph (c)(2) of this section to make “reasonable efforts” to obtain necessary information.

**§§ 23.441–23.449 [Reserved]**

**§ 23.450 Requirements for swap dealers and major swap participants acting as counterparties to Special Entities.**

(a) *Definitions.* For purposes of this section:

(1) The term “principal relationship” means where a swap dealer or major swap participant is a principal of the representative of a Special Entity or the representative of a Special Entity is a principal of the swap dealer or major swap participant. The term “principal” means any person listed in § 3.1(a)(1) through (3) of this chapter.

(2) The term “statutory disqualification” means grounds for refusal to register or to revoke, condition, or restrict the registration of any registrant or applicant for registration as set forth in Sections 8a(2) and 8a(3) of the Act.

(b)(1) Any swap dealer or major swap participant that offers to enter or enters into a swap with a Special Entity, other than a Special Entity defined in § 23.401(c)(3), shall have a reasonable basis to believe that the Special Entity has a representative that:

(i) Has sufficient knowledge to evaluate the transaction and risks;

(ii) Is not subject to a statutory disqualification;

(iii) Is independent of the swap dealer or major swap participant;

(iv) Undertakes a duty to act in the best interests of the Special Entity it represents;

(v) Makes appropriate and timely disclosures to the Special Entity;

(vi) Evaluates, consistent with any guidelines provided by the Special Entity, fair pricing and the appropriateness of the swap; and

(vii) In the case of a Special Entity as defined in § 23.401(c)(2) or (4), is subject to restrictions on certain political contributions imposed by the Commission, the Securities and Exchange Commission, or a self-regulatory organization subject to the jurisdiction of the Commission or the Securities and Ex-

change Commission; provided however, that this paragraph (b)(1)(vii) of this section shall not apply if the representative is an employee of the Special Entity.

(2) Any swap dealer or major swap participant that offers to enter or enters into a swap with a Special Entity as defined in § 23.401(c)(3) shall have a reasonable basis to believe that the Special Entity has a representative that is a fiduciary as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(c) *Independent.* For purposes of paragraph (b)(1)(iii) of this section, a representative of a Special Entity will be deemed to be independent of the swap dealer or major swap participant if:

(1) The representative is not and, within one year of representing the Special Entity in connection with the swap, was not an associated person of the swap dealer or major swap participant within the meaning of Section 1a(4) of the Act;

(2) There is no principal relationship between the representative of the Special Entity and the swap dealer or major swap participant;

(3) The representative:

(i) Provides timely and effective disclosures to the Special Entity of all material conflicts of interest that could reasonably affect the judgment or decision making of the representative with respect to its obligations to the Special Entity; and

(ii) Complies with policies and procedures reasonably designed to manage and mitigate such material conflicts of interest;

(4) The representative is not directly or indirectly, through one or more persons, controlled by, in control of, or under common control with the swap dealer or major swap participant; and

(5) The swap dealer or major swap participant did not refer, recommend, or introduce the representative to the Special Entity within one year of the representative’s representation of the Special Entity in connection with the swap.

(d) *Safe harbor.* (1) A swap dealer or major swap participant shall be deemed to have a reasonable basis to believe that the Special Entity, other than a Special Entity defined in



§ 23.401(c)(3), has a representative that satisfies the applicable requirements of paragraph (b)(1) of this section, provided that:

(i) The Special Entity represents in writing to the swap dealer or major swap participant that it has complied in good faith with written policies and procedures reasonably designed to ensure that it has selected a representative that satisfies the applicable requirements of paragraph (b) of this section, and that such policies and procedures provide for ongoing monitoring of the performance of such representative consistent with the requirements of paragraph (b) of this section; and

(ii) The representative represents in writing to the Special Entity and swap dealer or major swap participant that the representative:

(A) Has policies and procedures reasonably designed to ensure that it satisfies the applicable requirements of paragraph (b) of this section;

(B) Meets the independence test in paragraph (c) of this section; and

(C) Is legally obligated to comply with the applicable requirements of paragraph (b) of this section by agreement, condition of employment, law, rule, regulation, or other enforceable duty.

(2) A swap dealer or major swap participant shall be deemed to have a reasonable basis to believe that a Special Entity defined in § 23.401(c)(3) has a representative that satisfies the applicable requirements in paragraph (b)(2) of this section, provided that the Special Entity provides in writing to the swap dealer or major swap participant the representative's name and contact information, and represents in writing that the representative is a fiduciary as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

(e) *Reasonable reliance on representations of the Special Entity.* A swap dealer or major swap participant may rely on written representations of a Special Entity and, as applicable under this section, the Special Entity's representative to satisfy any requirement of this section as provided in § 23.402(d).

(f) *Chief compliance officer review.* If a swap dealer or major swap participant initially determines that it does not

have a reasonable basis to believe that the representative of a Special Entity meets the criteria established in this section, the swap dealer or major swap participant shall make a written record of the basis for such determination and submit such determination to its chief compliance officer for review to ensure that the swap dealer or major swap participant has a substantial, unbiased basis for the determination.

(g) Before the initiation of a swap, a swap dealer or major swap participant shall disclose to the Special Entity in writing:

(1) The capacity in which it is acting in connection with the swap; and

(2) If the swap dealer or major swap participant engages in business with the Special Entity in more than one capacity, the swap dealer or major swap participant shall disclose the material differences between such capacities.

(h) This section shall not apply with respect to a transaction that is:

(1) Initiated on a designated contract market or swap execution facility; and

(2) One in which the swap dealer or major swap participant does not know the identity of the counterparty to the transaction prior to execution.

**§ 23.451 Political contributions by certain swap dealers.**

(a) *Definitions.* For the purposes of this section:

(1) The term “contribution” means any gift, subscription, loan, advance, or deposit of money or anything of value made:

(i) For the purpose of influencing any election for federal, state, or local office;

(ii) For payment of debt incurred in connection with any such election; or

(iii) For transition or inaugural expenses incurred by the successful candidate for federal, state, or local office.

(2) The term “covered associate” means:

(i) Any general partner, managing member, or executive officer, or other person with a similar status or function;

(ii) Any employee who solicits a governmental Special Entity for the swap dealer and any person who supervises,

directly or indirectly, such employee; and

(iii) Any political action committee controlled by the swap dealer or by any person described in paragraphs (a)(2)(i) and (a)(2)(ii) of this section.

(3) The term “governmental Special Entity” means any Special Entity defined in § 23.401(c)(2) or (4).

(4) The term “official” of a governmental Special Entity means any person (including any election committee for such person) who was, at the time of the contribution, an incumbent, candidate, or successful candidate for elective office of a governmental Special Entity, if the office:

(i) Is directly or indirectly responsible for, or can influence the outcome of, the selection of a swap dealer by a governmental Special Entity; or

(ii) Has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the selection of a swap dealer by a governmental Special Entity.

(5) The term “payment” means any gift, subscription, loan, advance, or deposit of money or anything of value.

(6) The term “regulated person” means:

(i) A person that is subject to restrictions on certain political contributions imposed by the Commission, the Securities and Exchange Commission, or a self-regulatory agency subject to the jurisdiction of the Commission or the Securities and Exchange Commission;

(ii) A general partner, managing member, or executive officer of such person, or other individual with a similar status or function; or

(iii) An employee of such person who solicits a governmental Special Entity for the swap dealer and any person who supervises, directly or indirectly, such employee.

(7) The term “solicit” means a direct or indirect communication by any person with a governmental Special Entity for the purpose of obtaining or retaining an engagement related to a swap.

(b) *Prohibitions and exceptions.* (1) As a means reasonably designed to prevent fraud, no swap dealer shall offer to enter into or enter into a swap or a trading strategy involving a swap with a governmental Special Entity within

two years after any contribution to an official of such governmental Special Entity was made by the swap dealer or by any covered associate of the swap dealer; provided however, that:

(2) This prohibition does not apply:

(i) If the only contributions made by the swap dealer to an official of such governmental Special Entity were made by a covered associate:

(A) To officials for whom the covered associate was entitled to vote at the time of the contributions, provided that the contributions in the aggregate do not exceed \$350 to any one official per election; or

(B) To officials for whom the covered associate was not entitled to vote at the time of the contributions, provided that the contributions in the aggregate do not exceed \$150 to any one official per election;

(ii) To a swap dealer as a result of a contribution made by a natural person more than six months prior to becoming a covered associate of the swap dealer, provided that this exclusion shall not apply if the natural person, after becoming a covered associate, solicits the governmental Special Entity on behalf of the swap dealer to offer to enter into or to enter into a swap or trading strategy involving a swap; or

(iii) To a swap that is:

(A) Initiated on a designated contract market or swap execution facility; and

(B) One in which the swap dealer does not know the identity of the counterparty to the transaction prior to execution.

(3) No swap dealer or any covered associate of the swap dealer shall:

(i) Provide or agree to provide, directly or indirectly, payment to any person to solicit a governmental Special Entity to offer to enter into, or to enter into, a swap with that swap dealer unless such person is a regulated person; or

(ii) Coordinate, or solicit any person or political action committee to make, any:

(A) Contribution to an official of a governmental Special Entity with which the swap dealer is offering to enter into, or has entered into, a swap; or

(B) Payment to a political party of a state or locality with which the swap dealer is offering to enter into or has entered into a swap or a trading strategy involving a swap.

(c) *Circumvention of rule.* No swap dealer shall, directly or indirectly, through or by any other person or means, do any act that would result in a violation of paragraph (b) of this section.

(d) *Requests for exemption.* The Commission, upon application, may conditionally or unconditionally exempt a swap dealer from the prohibition under paragraph (b) of this section. In determining whether to grant an exemption, the Commission will consider, among other factors:

(1) Whether the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes of the Act;

(2) Whether the swap dealer:

(i) Before the contribution resulting in the prohibition was made, implemented policies and procedures reasonably designed to prevent violations of this section;

(ii) Prior to or at the time the contribution which resulted in such prohibition was made, had no actual knowledge of the contribution; and

(iii) After learning of the contribution:

(A) Has taken all available steps to cause the contributor involved in making the contribution which resulted in such prohibition to obtain a return of the contribution; and

(B) Has taken such other remedial or preventive measures as may be appropriate under the circumstances;

(3) Whether, at the time of the contribution, the contributor was a covered associate or otherwise an employee of the swap dealer, or was seeking such employment;

(4) The timing and amount of the contribution which resulted in the prohibition;

(5) The nature of the election (*e.g.*, federal, state or local); and

(6) The contributor's apparent intent or motive in making the contribution that resulted in the prohibition, as evidenced by the facts and circumstances surrounding the contribution.

(e) *Prohibitions inapplicable.* (1) The prohibitions under paragraph (b) of this section shall not apply to a contribution made by a covered associate of the swap dealer if:

(i) The swap dealer discovered the contribution within 120 calendar days of the date of such contribution;

(ii) The contribution did not exceed the amounts permitted by paragraphs (b)(2)(i)(A) or (B) of this section; and

(iii) The covered associate obtained a return of the contribution within 60 calendar days of the date of discovery of the contribution by the swap dealer.

(2) A swap dealer may not rely on paragraph (e)(1) of this section more than twice in any 12-month period.

(3) A swap dealer may not rely on paragraph (e)(1) of this section more than once for any covered associate, regardless of the time between contributions.

## Subpart I—Swap Documentation

SOURCE: 77 FR 21307, Apr. 9, 2012, unless otherwise noted.

### § 23.500 Definitions.

For purposes of this subpart I, the following terms shall be defined as provided.

(a) *Acknowledgment* means a written or electronic record of all of the terms of a swap signed and sent by one counterparty to the other.

(b) *Bilateral portfolio compression exercise* means an exercise in which two swap counterparties wholly terminate or change the notional value of some or all of the swaps submitted by the counterparties for inclusion in the portfolio compression exercise and, depending on the methodology employed, replace the terminated swaps with other swaps whose combined notional value (or some other measure of risk) is less than the combined notional value (or some other measure of risk) of the terminated swaps in the exercise.

(c) *Confirmation* means the consummation (electronically or otherwise) of legally binding documentation

(electronic or otherwise) that memorializes the agreement of the counterparties to all of the terms of a swap transaction. A confirmation must be in writing (whether electronic or otherwise) and must legally supersede any previous agreement (electronically or otherwise). A confirmation is created when an acknowledgment is manually, electronically, or by some other legally equivalent means, signed by the receiving counterparty.

(d) *Execution* means, with respect to a swap transaction, an agreement by the counterparties (whether orally, in writing, electronically, or otherwise) to the terms of the swap transaction that legally binds the counterparties to such terms under applicable law.

(e) *Financial entity* means a counterparty that is not a swap dealer or a major swap participant and that is one of the following:

(1) A commodity pool as defined in Section 1a(5) of the Act;

(2) A private fund as defined in Section 202(a) of the Investment Advisors Act of 1940;

(3) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974;

(4) A person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature as defined in Section 4(k) of the Bank Holding Company Act of 1956; and

(5) A security-based swap dealer or a major security-based swap participant.

(f) *Fully offsetting swaps* means swaps of equivalent terms where no net cash flow would be owed to either counterparty after the offset of payment obligations thereunder.

(g) *Material terms* means all terms of a swap required to be reported in accordance with part 45 of this chapter.

(h) *Multilateral portfolio compression exercise* means an exercise in which multiple swap counterparties wholly terminate or change the notional value of some or all of the swaps submitted by the counterparties for inclusion in the portfolio compression exercise and, depending on the methodology employed, replace the terminated swaps with other swaps whose combined notional value (or some other measure of

risk) is less than the combined notional value (or some other measure of risk) of the terminated swaps in the compression exercise.

(i) *Portfolio reconciliation* means any process by which the two parties to one or more swaps:

(1) Exchange the terms of all swaps in the swap portfolio between the counterparties;

(2) Exchange each counterparty's valuation of each swap in the swap portfolio between the counterparties as of the close of business on the immediately preceding business day; and

(3) Resolve any discrepancy in material terms and valuations.

(j) *Prudential regulator* has the meaning given to the term in section 1a(39) of the Commodity Exchange Act and includes the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Association, and the Federal Housing Finance Agency, as applicable to the swap dealer or major swap participant.

(k) *Swap portfolio* means all swaps currently in effect between a particular swap dealer or major swap participant and a particular counterparty.

(l) *Swap transaction* means any event that results in a new swap or in a change to the terms of a swap, including execution, termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap.

(m) *Valuation* means the current market value or net present value of a swap.

[77 FR 55960, Sept. 11, 2012]

#### § 23.501 Swap confirmation.

(a) *Confirmation*. Subject to the compliance schedule in paragraph (c) of this section:

(1) Each swap dealer and major swap participant entering into a swap transaction with a counterparty that is a swap dealer or major swap participant shall execute a confirmation for the swap transaction as soon as technologically practicable, but in any event by the end of first business day following the day of execution.

(2) Each swap dealer and major swap participant entering into a swap transaction with a counterparty that is not a swap dealer or a major swap participant shall send an acknowledgment of such swap transaction as soon as technologically practicable, but in any event by the end of the first business day following the day of execution.

(3) (i) Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to ensure that it executes a confirmation for each swap transaction that it enters into with a counterparty that is a financial entity as soon as technologically practicable, but in any event by the end of the first business day following the day of execution.

(ii) Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to ensure that it executes a confirmation for each swap transaction that it enters into with a counterparty that is not a swap dealer, major swap participant, or a financial entity not later than the end of the second business day following the day of execution.

(iii) Such procedures shall include a requirement that, upon a request by a prospective counterparty prior to execution of any such swap, the swap dealer or major swap participant furnish to the prospective counterparty prior to execution a draft acknowledgment specifying all terms of the swap transaction other than the applicable pricing and other relevant terms that are to be expressly agreed at execution.

(4) Swaps executed on a swap execution facility, designated contract market, or submitted for clearing by a derivatives clearing organization.

(i) Any swap transaction executed on a swap execution facility or designated contract market shall be deemed to satisfy the requirements of this section, provided that the rules of the swap execution facility or designated contract market establish that confirmation of all terms of the transaction shall take place at the same time as execution.

(ii) Any swap transaction submitted for clearing by a derivatives clearing organization shall be deemed to satisfy

the requirements of this section, provided that:

(A) The swap transaction is submitted for clearing as soon as technologically practicable, but in any event no later than the times established for confirmation under paragraphs (a)(1) or (3) of this section, and

(B) Confirmation of all terms of the transaction takes place at the same time as the swap transaction is accepted for clearing pursuant to the rules of the derivatives clearing organization.

(iii) If a swap dealer or major swap participant receives notice that a swap transaction has not been confirmed by a swap execution facility or a designated contract market, or accepted for clearing by a derivatives clearing organization, the swap dealer or major swap participant shall execute a confirmation for such swap transaction as soon as technologically practicable, but in any event no later than the times established for confirmation under paragraphs (a)(1) or (3) of this section as if such swap transaction were executed at the time the swap dealer or major swap participant receives such notice.

(5) For purposes of this section:

(i) “Day of execution” means the calendar day of the party to the swap transaction that ends latest, provided that if a swap transaction is—

(A) Entered into after 4:00 p.m. in the place of a party; or

(B) Entered into on a day that is not a business day in the place of a party, then such swap transaction shall be deemed to have been entered into by that party on the immediately succeeding business day of that party, and the day of execution shall be determined with reference to such business day; and

(ii) “Business day” means any day other than a Saturday, Sunday, or legal holiday.

(b) *Recordkeeping.* (1) Each swap dealer and major swap participant shall make and retain a record of:

(i) The date and time of transmission to, or receipt from, a counterparty of any acknowledgment; and

(ii) The date and time of transmission to, or receipt from, a counterparty of any confirmation.

(2) All records required to be maintained pursuant to this section shall be maintained in accordance with § 23.203 and shall be made available promptly upon request to any representative of the Commission or any applicable prudential regulator, or with regard to swaps defined in section 1a(47)(A)(v), to any representative of the Commission, the Securities and Exchange Commission, or any applicable prudential regulator.

(c) *Compliance schedule.* The requirements of paragraph (a) of this section are subject to the following compliance schedule:

(1) For purposes of paragraph (a)(1) of this section, each swap dealer and major swap participant entering into a swap transaction that is or involves a credit swap or interest rate swap with a counterparty that is a swap dealer or major swap participant shall execute a confirmation for the swap transaction as soon as technologically practicable, but in any event by:

(i) The end of the second business day following the day of execution for the period from the effective date of this section to February 28, 2014; and

(ii) The end of the first business day following the day of execution from and after March 1, 2014.

(2) For purposes of paragraph (a)(1) of this section, each swap dealer and major swap participant entering into a swap transaction that is or involves an equity swap, foreign exchange swap, or other commodity swap with a counterparty that is a swap dealer or major swap participant shall execute a confirmation for the swap transaction as soon as technologically practicable, but in any event by:

(i) The end of the third business day following the day of execution for the period from the effective date of this section to August 31, 2013;

(ii) The end of the second business day following the day of execution for the period from September 1, 2013 to August 31, 2014; and

(iii) The end of the first business day following the day of execution from and after September 1, 2014.

(3) For purposes of paragraph (a)(2) of this section, each swap dealer and major swap participant entering into a swap transaction that is or involves a

credit swap or interest rate swap with a counterparty that is not a swap dealer or a major swap participant shall send an acknowledgment of such swap transaction as soon as technologically practicable, but in any event by:

(i) The end of the second business day following the day of execution for the period from the effective date of this section to February 28, 2014; and

(ii) The end of the first business day following the day of execution from and after March 1, 2014.

(4) For purposes of paragraph (a)(2) of this section, each swap dealer and major swap participant entering into a swap transaction that is or involves an equity swap, foreign exchange swap, or other commodity swap with a counterparty that is not a swap dealer or a major swap participant shall send an acknowledgment of such swap transaction as soon as technologically practicable, but in any event by:

(i) The end of the third business day following the day of execution for the period from the effective date of this section to August 31, 2013;

(ii) The end of the second business day following the day of execution for the period from September 1, 2013 to August 31, 2014; and

(iii) The end of the first business day following the day of execution from and after September 1, 2014.

(5) For purposes of paragraph (a)(3)(i) of this section, each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to ensure that it executes a confirmation for each swap transaction that is or involves a credit swap or interest rate swap that it enters into with a counterparty that is a financial entity as soon as technologically practicable, but in any event by:

(i) The end of the second business day following the day of execution for the period from the effective date of this section to February 28, 2014; and

(ii) The end of the first business day following the day of execution from and after March 1, 2014.

(6) For purposes of paragraph (a)(3)(i) of this section, each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to

ensure that it executes a confirmation for each swap transaction that is or involves an equity swap, foreign exchange swap, or other commodity swap that it enters into with a counterparty that is a financial entity as soon as technologically practicable, but in any event by:

(i) The end of the third business day following the day of execution for the period from the effective date of this section to August 31, 2013;

(ii) The end of the second business day following the day of execution for the period from September 1, 2013 to August 31, 2014; and

(iii) The end of the first business day following the day of execution from and after September 1, 2014.

(7) For purposes of paragraph (a)(3)(ii) of this section, each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to ensure that it executes a confirmation for each swap transaction that is or involves a credit swap or interest rate swap that it enters into with a counterparty that is not a swap dealer, major swap participant, or a financial entity not later than:

(i) The end of the fifth business day following the day of execution for the period from the effective date of this section to August 31, 2013;

(ii) The end of the third business day following the day of execution for the period from September 1, 2013 to August 31, 2014; and

(iii) The end of the second business day following the day of execution from and after September 1, 2014.

(8) For purposes of paragraph (a)(3)(ii) of this section, each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to ensure that it executes a confirmation for each swap transaction that is or involves an equity swap, foreign exchange swap, or other commodity swap that it enters into with a counterparty that is not a swap dealer, major swap participant, or a financial entity not later than:

(i) The end of the seventh business day following the day of execution for

the period from the effective date of this section to August 31, 2013;

(ii) The end of the fourth business day following the day of execution for the period from September 1, 2013 to August 31, 2014; and

(iii) The end of the second business day following the day of execution from and after September 1, 2014.

(9) For purposes of paragraph (c) of this section:

(i) “Credit swap” means any swap that is primarily based on instruments of indebtedness, including, without limitation: Any swap primarily based on one or more broad-based indices related to instruments of indebtedness; and any swap that is an index credit swap or total return swap on one or more indices of debt instruments;

(ii) “Equity swap” means any swap that is primarily based on equity securities, including, without limitation: Any swap primarily based on one or more broad-based indices of equity securities; and any total return swap on one or more equity indices;

(iii) “Foreign exchange swap” has the meaning set forth in section 1a(25) of the CEA. It does not include swaps primarily based on rates of exchange between different currencies, changes in such rates, or other aspects of such rates (sometimes known as “cross-currency swaps”);

(iv) “Interest rate swap” means any swap which is primarily based on one or more interest rates, such as swaps of payments determined by fixed and floating interest rates; or any swap which is primarily based on rates of exchange between different currencies, changes in such rates, or other aspects of such rates (sometimes known as “cross-currency swaps”); and

(v) “Other commodity swap” means any swap not included in the credit, equity, foreign exchange, or interest rate asset classes, including, without limitation, any swap for which the primary underlying item is a physical commodity or the price or any other aspect of a physical commodity.

[77 FR 55960, Sept. 11, 2012]

#### § 23.502 Portfolio reconciliation.

(a) *Swaps with swap dealers or major swap participants.* Each swap dealer and major swap participant shall engage in

portfolio reconciliation as follows for all swaps in which its counterparty is also a swap dealer or major swap participant.

(1) Each swap dealer or major swap participant shall agree in writing with each of its counterparties on the terms of the portfolio reconciliation.

(2) The portfolio reconciliation may be performed on a bilateral basis by the counterparties or by a qualified third party.

(3) The portfolio reconciliation shall be performed no less frequently than:

(i) Once each business day for each swap portfolio that includes 500 or more swaps;

(ii) Once each week for each swap portfolio that includes more than 50 but fewer than 500 swaps on any business day during any week; and

(iii) Once each calendar quarter for each swap portfolio that includes no more than 50 swaps at any time during the calendar quarter.

(4) Each swap dealer and major swap participant shall resolve immediately any discrepancy in a material term of a swap identified as part of a portfolio reconciliation or otherwise.

(5) Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to resolve any discrepancy in a valuation identified as part of a portfolio reconciliation or otherwise as soon as possible, but in any event within five business days, provided that the swap dealer and major swap participant establishes, maintains, and follows written policies and procedures reasonably designed to identify how the swap dealer or major swap participant will comply with any variation margin requirements under section 4s(e) of the Act and regulations under this part pending resolution of the discrepancy in valuation. A difference between the lower valuation and the higher valuation of less than 10 percent of the higher valuation need not be deemed a discrepancy.

(b) *Swaps with entities other than swap dealers or major swap participants.* Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to ensure that it engages in portfolio reconciliation as

follows for all swaps in which its counterparty is neither a swap dealer nor a major swap participant.

(1) Each swap dealer or major swap participant shall agree in writing with each of its counterparties on the terms of the portfolio reconciliation, including agreement on the selection of any third-party service provider.

(2) The portfolio reconciliation may be performed on a bilateral basis by the counterparties or by one or more third parties selected by the counterparties in accordance with paragraph (b)(1) of this section.

(3) The required policies and procedures shall provide that portfolio reconciliation will be performed no less frequently than:

(i) Once each calendar quarter for each swap portfolio that includes more than 100 swaps at any time during the calendar quarter; and

(ii) Once annually for each swap portfolio that includes no more than 100 swaps at any time during the calendar year.

(4) Each swap dealer or major swap participant shall establish, maintain, and follow written procedures reasonably designed to resolve any discrepancies in the material terms or valuation of each swap identified as part of a portfolio reconciliation or otherwise with a counterparty that is neither a swap dealer nor major swap participant in a timely fashion. A difference between the lower valuation and the higher valuation of less than 10 percent of the higher valuation need not be deemed a discrepancy.

(c) *Reporting.* Each swap dealer and major swap participant shall promptly notify the Commission and any applicable prudential regulator, or with regard to swaps defined in section 1a(47)(A)(v) of the Act, the Commission, the Securities and Exchange Commission, and any applicable prudential regulator, of any swap valuation dispute in excess of \$20,000,000 (or its equivalent in any other currency) if not resolved within:

(1) Three (3) business days, if the dispute is with a counterparty that is a swap dealer or major swap participant; or

(2) Five (5) business days, if the dispute is with a counterparty that is not



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a swap dealer or major swap participant.

(d) *Reconciliation of cleared swaps.* Nothing in this section shall apply to a swap that is cleared by a derivatives clearing organization.

(e) *Recordkeeping.* A record of each swap portfolio reconciliation consistent with § 23.202(a)(3)(iii) shall be maintained in accordance with § 23.203.

[77 FR 55960, Sept. 11, 2012]

### § 23.503 Portfolio compression.

(a) *Portfolio compression with swap dealers and major swap participants—(1) Bilateral offset.* Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures for terminating each fully offsetting swap between a swap dealer or major swap participant and another swap dealer or major swap participant in a timely fashion, when appropriate.

(2) *Bilateral compression.* Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures for periodically engaging in bilateral portfolio compression exercises, when appropriate, with each counterparty that is also a swap dealer or major swap participant.

(3) *Multilateral compression.* Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures for periodically engaging in multilateral portfolio compression exercises, when appropriate, with each counterparty that is also a swap dealer or major swap participant. Such policies and procedures shall include:

(i) Policies and procedures for participation in all multilateral portfolio compression exercises required by Commission regulation or order; and

(ii) Evaluation of multilateral portfolio compression exercises that are initiated, offered, or sponsored by any third party.

(b) *Portfolio compression with counterparties other than swap dealers and major swap participants.* Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures for periodically terminating fully offsetting swaps and for engaging in portfolio compression exer-

cises with respect to swaps in which its counterparty is an entity other than a swap dealer or major swap participant, to the extent requested by any such counterparty.

(c) *Portfolio compression of cleared swaps.* Nothing in this section shall apply to a swap that is cleared by a derivatives clearing organization.

(d) *Recordkeeping.* (1) Each swap dealer and major swap participant shall make and maintain a complete and accurate record of each bilateral offset and each bilateral or multilateral portfolio compression exercise in which it participates.

(2) All records required to be maintained pursuant to this section shall be maintained in accordance with § 23.203 and shall be made available promptly upon request to any representative of the Commission or any applicable prudential regulator, or with regard to swaps defined in section 1a(47)(A)(v) of the Act, to any representative of the Commission, the Securities and Exchange Commission, or any applicable prudential regulator.

[77 FR 55960, Sept. 11, 2012]

### § 23.504 Swap trading relationship documentation.

(a) (1) *Applicability.* The requirements of this section shall not apply to:

(i) Swaps executed prior to the date on which a swap dealer or major swap participant is required to be in compliance with this section;

(ii) Swaps executed on a board of trade designated as a contract market under section 5 of the Act or to swaps executed anonymously on a swap execution facility under section 5h of the Act, *provided that* such swaps are cleared by a derivatives clearing organization and all terms of the swaps conform to the rules of the derivatives clearing organization and § 39.12(b)(6) of this chapter; and

(iii) Swaps cleared by a derivatives clearing organization.

(2) *Policies and procedures.* Each swap dealer and major swap participant shall establish, maintain, and follow written policies and procedures reasonably designed to ensure that the swap dealer or major swap participant executes written swap trading relationship documentation with its counterparty

that complies with the requirements of this section. The policies and procedures shall be approved in writing by senior management of the swap dealer and major swap participant, and a record of the approval shall be retained. Other than confirmations of swap transactions under § 23.501, the swap trading relationship documentation shall be executed prior to or contemporaneously with entering into a swap transaction with any counterparty.

(b) *Swap trading relationship documentation.* (1) The swap trading relationship documentation shall be in writing and shall include all terms governing the trading relationship between the swap dealer or major swap participant and its counterparty, including, without limitation, terms addressing payment obligations, netting of payments, events of default or other termination events, calculation and netting of obligations upon termination, transfer of rights and obligations, governing law, valuation, and dispute resolution.

(2) The swap trading relationship documentation shall include all confirmations of swap transactions under § 23.501.

(3) The swap trading relationship documentation shall include credit support arrangements, which shall contain, in accordance with applicable requirements under Commission regulations or regulations adopted by prudential regulators and without limitation, the following:

(i) Initial and variation margin requirements, if any;

(ii) Types of assets that may be used as margin and asset valuation haircuts, if any;

(iii) Investment and rehypothecation terms for assets used as margin for uncleared swaps, if any; and

(iv) Custodial arrangements for margin assets, including whether margin assets are to be segregated with an independent third party, in accordance with § 23.701(e), if any.

(4) (i) The swap trading relationship documentation between swap dealers, between major swap participants, between a swap dealer and major swap participant, between a swap dealer or major swap participant and a financial

entity, and, if requested by any other counterparty, between a swap dealer or major swap participant and such counterparty, shall include written documentation in which the parties agree on the process, which may include any agreed upon methods, procedures, rules, and inputs, for determining the value of each swap at any time from execution to the termination, maturity, or expiration of such swap for the purposes of complying with the margin requirements under section 4s(e) of the Act and regulations under this part, and the risk management requirements under section 4s(j) of the Act and regulations under this part. To the maximum extent practicable, the valuation of each swap shall be based on recently-executed transactions, valuations provided by independent third parties, or other objective criteria.

(ii) Such documentation shall include either:

(A) Alternative methods for determining the value of the swap for the purposes of complying with this paragraph in the event of the unavailability or other failure of any input required to value the swap for such purposes; or

(B) A valuation dispute resolution process by which the value of the swap shall be determined for the purposes of complying with this paragraph (b)(4).

(iii) A swap dealer or major swap participant is not required to disclose to the counterparty confidential, proprietary information about any model it may use to value a swap.

(iv) The parties may agree on changes or procedures for modifying or amending the documentation required by this paragraph at any time.

(5) The swap trading relationship documentation of a swap dealer or major swap participant shall include the following:

(i) A statement of whether the swap dealer or major swap participant is an insured depository institution (as defined in 12 U.S.C. 1813) or a financial company (as defined in section 201(a)(11) of the Dodd-Frank Act, 12 U.S.C. 5381(a)(11));

(ii) A statement of whether the counterparty is an insured depository institution or financial company;

(iii) A statement that in the event either the swap dealer or major swap participant or its counterparty is a covered financial company (as defined in section 201(a)(8) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5381(a)(8)) or an insured depository institution for which the Federal Deposit Insurance Corporation (FDIC) has been appointed as a receiver (the “covered party”), certain limitations under Title II of the Dodd-Frank Act or the Federal Deposit Insurance Act may apply to the right of the non-covered party to terminate, liquidate, or net any swap by reason of the appointment of the FDIC as receiver, notwithstanding the agreement of the parties in the swap trading relationship documentation, and that the FDIC may have certain rights to transfer swaps of the covered party under section 210(c)(9)(A) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5390(c)(9)(A), or 12 U.S.C. 1821(e)(9)(A); and

(iv) An agreement between the swap dealer or major swap participant and its counterparty to provide notice if either it or its counterparty becomes or ceases to be an insured depository institution or a financial company.

(6) The swap trading relationship documentation of each swap dealer and major swap participant shall contain a notice that, upon acceptance of a swap by a derivatives clearing organization:

- (i) The original swap is extinguished;
- (ii) The original swap is replaced by equal and opposite swaps with the derivatives clearing organization; and

(iii) All terms of the swap shall conform to the product specifications of the cleared swap established under the derivatives clearing organization’s rules.

(c) *Audit of swap trading relationship documentation.* Each swap dealer and major swap participant shall have an independent internal or external auditor conduct periodic audits sufficient to identify any material weakness in its documentation policies and procedures required by this section and Commission regulations. A record of the results of each audit shall be retained.

(d) *Recordkeeping.* Each swap dealer and major swap participant shall maintain all documents required to be created pursuant to this section in accordance with § 23.203 and shall make them available promptly upon request to any representative of the Commission or any applicable prudential regulator, or with regard to swaps defined in section 1a(47)(A)(v) of the Act, to any representative of the Commission, the Securities and Exchange Commission, or any applicable prudential regulator.

[77 FR 55960, Sept. 11, 2012]

**§ 23.505 End user exception documentation.**

(a) *For swaps excepted from a mandatory clearing requirement.* Each swap dealer and major swap participant shall obtain documentation sufficient to provide a reasonable basis on which to believe that its counterparty meets the statutory conditions required for an exception from a mandatory clearing requirement, as defined in section 2h(7) of the Act and § 50.50 of this chapter. Such documentation shall include:

- (1) The identity of the counterparty;
- (2) That the counterparty has elected not to clear a particular swap under section 2h(7) of the Act and § 50.50 of this chapter;
- (3) That the counterparty is a non-financial entity, as defined in section 2h(7)(C) of the Act;
- (4) That the counterparty is hedging or mitigating a commercial risk; and
- (5) That the counterparty generally meets its financial obligations associated with non-cleared swaps. *Provided*, that a swap dealer or major swap participant need not obtain documentation of paragraphs (a)(3), (4), or (5) of this section if it obtains documentation that its counterparty has reported the information listed in § 50.50(b)(1)(iii) in accordance with § 50.50(b)(2) of this chapter.

(b) *Recordkeeping.* Each swap dealer and major swap participant shall maintain all documents required to be obtained pursuant to this section in accordance with § 23.203 and shall make them available promptly upon request to any representative of the Commission or any applicable prudential regulator, or with regard to swaps defined in section 1a(47)(A)(v) of the Act, to

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any representative of the Commission, the Securities and Exchange Commission, or any applicable prudential regulator.

[77 FR 55960, Sep. 11, 2012, as amended at 78 FR 21046, Apr. 9, 2013]

### § 23.506 Swap processing and clearing.

(a) *Swap processing.* (1) Each swap dealer and major swap participant shall ensure that it has the capacity to route swap transactions not executed on a swap execution facility or designated contract market to a derivatives clearing organization in a manner acceptable to the derivatives clearing organization for the purposes of clearing; and

(2) Each swap dealer and major swap participant shall coordinate with each derivatives clearing organization to which the swap dealer, major swap participant, or its clearing member submits transactions for clearing, to facilitate prompt and efficient swap transaction processing in accordance with the requirements of § 39.12(b)(7) of this chapter.

(b) *Swap clearing.* With respect to each swap that is not executed on a swap execution facility or a designated contract market, each swap dealer and major swap participant shall:

(1) If such swap is subject to a mandatory clearing requirement pursuant to section 2(h)(1) of the Act and an exception pursuant to 2(h)(7) is not applicable, submit such swap for clearing to a derivatives clearing organization as soon as technologically practicable after execution of the swap, but no later than the close of business on the day of execution; or

(2) If such swap is not subject to a mandatory clearing requirement pursuant to section 2(h)(1) of the Act but is accepted for clearing by any derivatives clearing organization and the swap dealer or major swap participant and its counterparty agree that such swap will be submitted for clearing, submit such swap for clearing not later than the next business day after execution of the swap, or the agreement to clear, if later than execution.

## Subpart J—Duties of Swap Dealers and Major Swap Participants

SOURCE: 77 FR 20205, Apr. 3, 2012, unless otherwise noted.

### § 23.600 Risk Management Program for swap dealers and major swap participants.

(a) *Definitions.* For purposes of subpart J, the following terms shall be defined as provided.

(1) *Affiliate.* This term means, with respect to any person, a person controlling, controlled by, or under common control with, such person.

(2) *Business trading unit.* This term means any department, division, group, or personnel of a swap dealer or major swap participant or any of its affiliates, whether or not identified as such, that performs, or personnel exercising direct supervisory authority over the performance of any pricing (excluding price verification for risk management purposes), trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities on behalf of a registrant.

(3) *Clearing unit.* This term means any department, division, group, or personnel of a registrant or any of its affiliates, whether or not identified as such, that performs, or personnel exercising direct supervisory authority over the performance of any proprietary or customer clearing activities on behalf of a registrant.

(4) *Governing body.* This term means:

(1) A board of directors;

(2) A body performing a function similar to a board of directors;

(3) Any committee of a board or body; or

(4) The chief executive officer of a registrant, or any such board, body, committee, or officer of a division of a registrant, provided that the registrant's swaps activities for which registration with the Commission is required are wholly contained in a separately identifiable division.

(5) *Prudential regulator.* This term has the same meaning as section 1a(39) of the Commodity Exchange Act and includes the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation,

the Farm Credit Association, and the Federal Housing Finance Agency, as applicable to the swap dealer or major swap participant.

(6) *Senior management.* This term means, with respect to a registrant, any officer or officers specifically granted the authority and responsibility to fulfill the requirements of senior management by the registrant's governing body.

(7) *Swaps activities.* This term means, with respect to a registrant, such registrant's activities related to swaps and any product used to hedge such swaps, including, but not limited to, futures, options, other swaps or security-based swaps, debt or equity securities, foreign currency, physical commodities, and other derivatives.

(b) *Risk management program*—(1) *Purpose.* Each swap dealer and major swap participant shall establish, document, maintain, and enforce a system of risk management policies and procedures designed to monitor and manage the risks associated with the swaps activities of the swap dealer or major swap participant. For purposes of this regulation, such policies and procedures shall be referred to collectively as a “Risk Management Program.”

(2) *Written policies and procedures.* Each swap dealer and major swap participant shall maintain written policies and procedures that describe the Risk Management Program of the swap dealer or major swap participant.

(3) *Approval by governing body.* The Risk Management Program and the written risk management policies and procedures shall be approved, in writing, by the governing body of the swap dealer or major swap participant.

(4) *Furnishing to the Commission.* Each swap dealer and major swap participant shall furnish a copy of its written risk management policies and procedures to the Commission, or to a futures association registered under section 17 of the Act, if directed by the Commission, upon application for registration and thereafter upon request.

(5) *Risk management unit.* As part of its Risk Management Program, each swap dealer and major swap participant shall establish and maintain a risk management unit with sufficient authority; qualified personnel; and fi-

nancial, operational, and other resources to carry out the risk management program established pursuant to this regulation. The risk management unit shall report directly to senior management and shall be independent from the business trading unit.

(c) *Elements of the Risk Management Program.* The Risk Management Program of each swap dealer and major swap participant shall include, at a minimum, the following elements:

(1) *Identification of risks and risk tolerance limits.* (i) The Risk Management Program should take into account market, credit, liquidity, foreign currency, legal, operational, settlement, and any other applicable risks together with a description of the risk tolerance limits set by the swap dealer or major swap participant and the underlying methodology in written policies and procedures. The risk tolerance limits shall be reviewed and approved quarterly by senior management and annually by the governing body. Exceptions to risk tolerance limits shall be subject to written policies and procedures.

(ii) The Risk Management Program shall take into account risks posed by affiliates and the Risk Management Program shall be integrated into risk management at the consolidated entity level.

(iii) The Risk Management Program shall include policies and procedures for detecting breaches of risk tolerance limits set by the swap dealer or major swap participant, and alerting supervisors within the risk management unit and senior management, as appropriate.

(2) *Periodic Risk Exposure Reports.* (i) The risk management unit of each swap dealer and major swap participant shall provide to senior management and to its governing body quarterly written reports setting forth the market, credit, liquidity, foreign currency, legal, operational, settlement, and any other applicable risk exposures of the swap dealer or major swap participant; any recommended or completed changes to the Risk Management Program; the recommended time frame for implementing recommended changes; and the status of any incomplete implementation of previously recommended changes to the Risk

Management Program. For purposes of this regulation, such reports shall be referred to as “Risk Exposure Reports.” The Risk Exposure Reports also shall be provided to the senior management and the governing body immediately upon detection of any material change in the risk exposure of the swap dealer or major swap participant.

(ii) *Furnishing to the Commission.* Each swap dealer and major swap participant shall furnish copies of its Risk Exposure Reports to the Commission within five (5) business days of providing such reports to its senior management.

(3) *New product policy.* The Risk Management Program of each swap dealer and major swap participant shall include a new product policy that is designed to identify and take into account the risks of any new product prior to engaging in transactions involving the new product. The new product policy should include the following elements:

(i) Consideration of the type of counterparty with which the new product will be transacted; the product’s characteristics and economic function; and whether the product requires a novel pricing methodology or presents novel legal and regulatory issues.

(ii) Identification and analysis of all relevant risks associated with the new product and how they will be managed. The risk analysis should include an assessment, if relevant, of any product, market, credit, liquidity, foreign currency, legal, operational, settlement, and any other risks associated with the new product. Product risk characteristics may include, if relevant, volatility, non-linear price characteristics, jump-to-default risk, and any correlation between the value of the product and the counterparty’s creditworthiness.

(iii) An assessment, signed by a supervisor in the risk management unit, as to whether the new product would materially alter the overall entity-wide risk profile of the swap dealer or major swap participant. If the new product would materially alter the overall risk profile of the swap dealer or major swap participant, the new product must be pre-approved by the

governing body before any transactions are effectuated.

(iv) A requirement that the risk management unit review the risk analysis to identify any necessary modifications to the Risk Management Program and implement such modifications prior to engaging in transactions involving the new product.

(v) Notwithstanding the foregoing, a swap dealer’s or major swap participant’s new product policy may include provisions permitting limited preliminary approval of new products—

(A) At a risk level that would not be material to the swap dealer or major swap participant; and

(B) Solely in order to provide the swap dealer or major swap participant with the opportunity to facilitate development of appropriate operational and risk management processes for such product.

(4) *Specific risk management considerations.* The Risk Management Program of each swap dealer and major swap participant shall include, but not be limited to, policies and procedures necessary to monitor and manage the following risks:

(i) *Market risk.* Market risk policies and procedures shall take into account, among other things:

(A) Daily measurement of market exposure, including exposure due to unique product characteristics, volatility of prices, basis and correlation risks, leverage, sensitivity of option positions, and position concentration, to comply with market risk tolerance limits;

(B) Timely and reliable valuation data derived from, or verified by, sources that are independent of the business trading unit, and if derived from pricing models, that the models have been independently validated by qualified, independent external or internal persons; and

(C) Periodic reconciliation of profits and losses resulting from valuations with the general ledger.

(ii) *Credit risk.* Credit risk policies and procedures shall take into account, among other things:

(A) Daily measurement of overall credit exposure to comply with counterparty credit limits;

(B) Monitoring and reporting of violations of counterparty credit limits performed by personnel that are independent of the business trading unit; and

(C) Regular valuation of collateral used to cover credit exposures and safeguarding of collateral to prevent loss, disposal, rehypothecation, or use unless appropriately authorized.

(iii) *Liquidity risk.* Liquidity risk policies and procedures shall take into account, among other things:

(A) Daily measurement of liquidity needs;

(B) Assessing procedures to liquidate all non-cash collateral in a timely manner and without significant effect on price; and

(C) Application of appropriate collateral haircuts that accurately reflect market and credit risk.

(iv) *Foreign currency risk.* Foreign currency risk policies and procedures shall take into account, among other things:

(A) Daily measurement of the amount of capital exposed to fluctuations in the value of foreign currency to comply with applicable limits; and

(B) Establishment of safeguards against adverse currency fluctuations.

(v) *Legal risk.* Legal risk policies and procedures shall take into account, among other things:

(A) Determinations that transactions and netting arrangements entered into have a sound legal basis; and

(B) Establishment of documentation tracking procedures designed to ensure the completeness of relevant documentation and to resolve any documentation exceptions on a timely basis.

(vi) *Operational risk.* Operational risk policies and procedures shall take into account, among other things:

(A) Secure and reliable operating and information systems with adequate, scalable capacity, and independence from the business trading unit;

(B) Safeguards to detect, identify, and promptly correct deficiencies in operating and information systems; and

(C) Reconciliation of all data and information in operating and information systems.

(vii) *Settlement risk.* Settlement risk policies and procedures shall take into account, among other things:

(A) Establishment of standard settlement instructions with each counterparty;

(B) Procedures to track outstanding settlement items and aging information in all accounts, including nostro and suspense accounts; and

(C) Procedures to ensure timely payments to counterparties and to resolve any late payments.

(5) *Use of central counterparties.* Each swap dealer and major swap participant shall establish policies and procedures relating to its use of central counterparties. Such policies and procedures shall:

(i) Require the use of central counterparties where clearing is required pursuant to Commission regulation or order, unless the counterparty has properly invoked a clearing exemption under Commission regulations;

(ii) Set forth the conditions for the voluntary use of central counterparties for clearing when available as a means of mitigating counterparty credit risk; and

(iii) Require diligent investigation into the adequacy of the financial resources and risk management procedures of any central counterparty through which the swap dealer or major swap participant clears.

(6) *Compliance with margin and capital requirements.* Each swap dealer and major swap participant shall satisfy all capital and margin requirements established by the Commission or prudential regulator, as applicable.

(7) *Monitoring of compliance with Risk Management Program.* Each swap dealer and major swap participant shall establish policies and procedures to detect violations of the Risk Management Program; to encourage employees to report such violations to senior management, without fear of retaliation; and to take specified disciplinary action against employees who violate the Risk Management Program.

(d) *Business trading unit.* Each swap dealer and major swap participant shall establish policies and procedures that, at a minimum:

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(1) Require all trading policies be approved by the governing body of the swap dealer or major swap participant;

(2) Require that traders execute transactions only with counterparties for whom credit limits have been established;

(3) Provide specific quantitative or qualitative limits for traders and personnel able to commit the capital of the swap dealer or major swap participant;

(4) Monitor each trader throughout the trading day to prevent the trader from exceeding any limit to which the trader is subject, or from otherwise incurring unauthorized risk;

(5) Require each trader to follow established policies and procedures for executing and confirming all transactions;

(6) Establish means to detect unauthorized trading activities or any other violation of policies and procedures;

(7) Ensure that all trade discrepancies are documented and, other than immaterial, clerical errors, are brought to the immediate attention of management of the business trading unit;

(8) Ensure that broker statements and payments to brokers are periodically audited by persons independent of the business trading unit;

(9) Ensure that use of trading programs is subject to policies and procedures governing the use, supervision, maintenance, testing, and inspection of the program; and

(10) Require the separation of personnel in the business trading unit from personnel in the risk management unit.

(e) *Review and testing.* (1) Risk Management Programs shall be reviewed and tested on at least an annual basis, or upon any material change in the business of the swap dealer or major swap participant that is reasonably likely to alter the risk profile of the swap dealer or major swap participant.

(2) The annual reviews of the Risk Management Program shall include an analysis of adherence to, and the effectiveness of, the risk management policies and procedures, and any recommendations for modifications to the Risk Management Program. The annual testing shall be performed by

qualified internal audit staff that are independent of the business trading unit being audited or by a qualified third party audit service reporting to staff that are independent of the business trading unit. The results of the annual review of the Risk Management Program shall be promptly reported to, and reviewed by, the chief compliance officer, senior management, and governing body of the swap dealer or major swap participant.

(3) Each swap dealer and major swap participant shall document all internal and external reviews and testing of its Risk Management Program and written risk management policies and procedures including the date of the review or test; the results; any deficiencies identified; the corrective action taken; and the date that corrective action was taken. Such documentation shall be provided to Commission staff, upon request.

(f) *Distribution of risk management policies and procedures.* The Risk Management Program shall include procedures for the timely distribution of its written risk management policies and procedures to relevant supervisory personnel. Each swap dealer and major swap participant shall maintain records of the persons to whom the risk management policies and procedures were distributed and when they were distributed.

(g) *Recordkeeping.* (1) Each swap dealer and major swap participant shall maintain copies of all written approvals required by this section.

(2) All records or reports that a swap dealer or major swap participant is required to maintain pursuant to this regulation shall be maintained in accordance with Commission Regulation §1.31 and shall be made available promptly upon request to representatives of the Commission and to representatives of applicable prudential regulators.

[77 FR 20205, Apr. 3, 2012, as amended at 79 FR 41126, July 15, 2014]

### § 23.601 Monitoring of position limits.

(a) Each swap dealer and major swap participant shall establish and enforce written policies and procedures that are reasonably designed to monitor for



and prevent violations of applicable position limits established by the Commission, a designated contract market, or a swap execution facility, and to monitor for and prevent improper reliance upon any exemptions or exclusions from such position limits. For purposes of this regulation, such policies and procedures shall be referred to as “Position Limit Procedures.” The Position Limit Procedures shall be incorporated into the Risk Management Program of the swap dealer or major swap participant.

(b) For purposes of the Position Limit Procedures, each swap dealer and major swap participant shall convert all swap positions into equivalent futures positions using the methodology set forth in Commission regulations.

(c) Each swap dealer and major swap participant shall provide training to all relevant personnel on applicable position limits on an annual basis and shall promptly notify personnel upon any change to applicable position limits. Each swap dealer and major swap participant shall maintain records of such training and notifications including the substance of the training, the identity of those receiving training, and the identity of those notified of changes to applicable position limits.

(d) Each swap dealer and major swap participant shall diligently monitor its trading activities and diligently supervise the actions of its partners, officers, employees, and agents to ensure compliance with the Position Limit Procedures of the swap dealer or major swap participant.

(e) The Position Limit Procedures of each swap dealer and major swap participant shall implement an early warning system designed to detect and alert its senior management when position limits are in danger of being breached (such as when trading has reached a percentage threshold of the applicable position limit, and when position limits have been exceeded). Any detected violation of applicable position limits shall be reported promptly to the firm’s governing body. Any detected violation of applicable position limits, other than on-exchange violations reported to the Commission by a designated contract market or a swap

execution facility, shall be reported promptly to the Commission. Each swap dealer and major swap participant shall maintain a record of any early warning received, any position limit violation detected, any action taken as a result of either, and the date action was taken.

(f) Each swap dealer and major swap participant that transacts in instruments for which position limits have been established by the Commission, a designated contract market, or a swap execution facility shall test its Position Limit Procedures for adequacy and effectiveness at least once each calendar quarter and maintain records of such tests; the results thereof; any action that is taken as a result thereof including, without limitation, any recommendations for modifications to the firm’s Position Limit Procedures; and the date action was taken.

(g) Each swap dealer and major swap participant shall document its compliance with applicable position limits established by the Commission, a designated contract market, or a swap execution facility in a written report on a quarterly basis. Such report shall be promptly reported to and reviewed by the chief compliance officer, senior management, and governing body of the swap dealer or major swap participant, and shall include, without limitation, a list of all early warnings received, all position limit violations, the action taken in response, the results of the quarterly position limit testing required by this regulation, any deficiencies in the Position Limit Procedures, the status of any pending amendments to the Position Limit Procedures, and any action taken to amend the Position Limit Procedures to ensure compliance with all applicable position limits. Each swap dealer and major swap participant shall retain a copy of this report.

(h) On an annual basis, each swap dealer and major swap participant shall audit its Position Limit Procedures as part of the audit of its Risk Management Program required by Commission regulations.

(i) All records required to be maintained pursuant to these regulations shall be maintained in accordance with Commission Regulation §1.31 and shall

be made available promptly upon request to representatives of the Commission and to representatives of applicable prudential regulators.

**§ 23.602 Diligent supervision.**

(a) *Supervision.* Each swap dealer and major swap participant shall establish and maintain a system to supervise, and shall diligently supervise, all activities relating to its business performed by its partners, members, officers, employees, and agents (or persons occupying a similar status or performing a similar function). Such system shall be reasonably designed to achieve compliance with the requirements of the Commodity Exchange Act and Commission regulations.

(b) *Supervisory System.* Such supervisory system shall provide, at a minimum, for the following:

(1) The designation, where applicable, of at least one person with authority to carry out the supervisory responsibilities of the swap dealer or major swap participant for all activities relating to its business as a swap dealer or major swap participant.

(2) The use of reasonable efforts to determine that all supervisors are qualified and meet such standards of training, experience, competence, and such other qualification standards as the Commission finds necessary or appropriate.

**§ 23.603 Business continuity and disaster recovery.**

(a) *Business continuity and disaster recovery plan required.* Each swap dealer and major swap participant shall establish and maintain a written business continuity and disaster recovery plan that outlines the procedures to be followed in the event of an emergency or other disruption of its normal business activities. The business continuity and disaster recovery plan shall be designed to enable the swap dealer or major swap participant to continue or to resume any operations by the next business day with minimal disturbance to its counterparties and the market, and to recover all documentation and data required to be maintained by applicable law and regulation.

(b) *Essential components.* The business continuity and disaster recovery plan

of a swap dealer or major swap participant shall include the following components:

(1) Identification of the documents, data, facilities, infrastructure, personnel and competencies essential to the continued operations of the swap dealer or major swap participant and to fulfill the obligations of the swap dealer or major swap participant.

(2) Identification of the supervisory personnel responsible for implementing each aspect of the business continuity and disaster recovery plan and the emergency contacts required to be provided pursuant to this regulation.

(3) A plan to communicate with the following persons in the event of an emergency or other disruption, to the extent applicable to the operations of the swap dealer or major swap participant: employees; counterparties; swap data repositories; execution facilities; trading facilities; clearing facilities; regulatory authorities; data, communications and infrastructure providers and other vendors; disaster recovery specialists and other persons essential to the recovery of documentation and data, the resumption of operations, and compliance with the Commodity Exchange Act and Commission regulations.

(4) Procedures for, and the maintenance of, back-up facilities, systems, infrastructure, alternative staffing and other resources to achieve the timely recovery of data and documentation and to resume operations as soon as reasonably possible and generally within the next business day.

(5) Maintenance of back-up facilities, systems, infrastructure and alternative staffing arrangements in one or more areas that are geographically separate from the swap dealer's or major swap participant's primary facilities, systems, infrastructure and personnel (which may include contractual arrangements for the use of facilities, systems and infrastructure provided by third parties).

(6) Back-up or copying, with sufficient frequency, of documents and data essential to the operations of the swap dealer or major swap participant or to fulfill the regulatory obligations of the swap dealer or major swap participant

and storing the information off-site in either hard-copy or electronic format.

(7) Identification of potential business interruptions encountered by third parties that are necessary to the continued operations of the swap dealer or major swap participant and a plan to minimize the impact of such disruptions.

(c) *Distribution to employees.* Each swap dealer and major swap participant shall distribute a copy of its business continuity and disaster recovery plan to relevant employees and promptly provide any significant revision thereto. Each swap dealer and major swap participant shall maintain copies of the business continuity and disaster recovery plan at one or more accessible off-site locations. Each swap dealer and major swap participant shall train relevant employees on applicable components of the business continuity and disaster recovery plan.

(d) *Commission notification.* Each swap dealer and major swap participant shall promptly notify the Commission of any emergency or other disruption that may affect the ability of the swap dealer or major swap participant to fulfill its regulatory obligations or would have a significant adverse effect on the swap dealer or major swap participant, its counterparties, or the market.

(e) *Emergency contacts.* Each swap dealer and major swap participant shall provide to the Commission the name and contact information of two employees who the Commission can contact in the event of an emergency or other disruption. The individuals identified shall be authorized to make key decisions on behalf of the swap dealer or major swap participant and have knowledge of the firm's business continuity and disaster recovery plan. The swap dealer or major swap participant shall provide the Commission with any updates to this information promptly.

(f) *Review and modification.* A member of the senior management of each swap dealer and major swap participant shall review the business continuity and disaster recovery plan annually or upon any material change to the business. Any deficiencies found or corrective action taken shall be documented.

(g) *Testing and audit.* Each business continuity and disaster recovery plan shall be tested annually by qualified, independent internal personnel or a qualified third party service. The date the testing was performed shall be documented, together with the nature and scope of the testing, any deficiencies found, any corrective action taken, and the date that corrective action was taken. Each business continuity and disaster recovery plan shall be audited at least once every three years by a qualified third party service. The date the audit was performed shall be documented, together with the nature and scope of the audit, any deficiencies found, any corrective action taken, and the date that corrective action was taken.

(h) *Business continuity and disaster recovery plans required by other regulatory authorities.* A swap dealer or major swap participant shall comply with the requirements of this regulation in addition to any business continuity and disaster recovery requirements that are imposed upon the swap dealer or major swap participant by its prudential regulator or any other regulatory or self-regulatory authority.

(i) *Recordkeeping.* The business continuity and disaster recovery plan of the swap dealer and major swap participant and all other records required to be maintained pursuant to this section shall be maintained in accordance with Commission Regulation §1.31 and shall be made available promptly upon request to representatives of the Commission and to representatives of applicable prudential regulators.

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**§ 23.605 Conflicts of interest policies and procedures.**

(a) *Definitions.* For purposes of this section, the following terms shall be defined as provided.

(1) *Affiliate.* This term means, with respect to any person, a person controlling, controlled by, or under common control with, such person.

(2) *Business trading unit.* This term means any department, division, group, or personnel of a swap dealer or major swap participant or any of its affiliates, whether or not identified as such,

that performs, or personnel exercising direct supervisory authority over the performance of, any pricing (excluding price verification for risk management purposes), trading, sales, marketing, advertising, solicitation, structuring, or brokerage activities on behalf of a swap dealer or major swap participant or any of its affiliates.

(3) *Clearing unit. This term means* any department, division, group, or personnel of a swap dealer or major swap participant or any of its affiliates, whether or not identified as such, that performs, or personnel exercising direct supervisory authority over the performance of, any proprietary or customer clearing activities on behalf of a swap dealer or major swap participant or any of its affiliates.

(4) *Derivative. This term means:*

(i) A contract for the purchase or sale of a commodity for future delivery;

(ii) A security futures product;

(iii) A swap;

(iv) Any agreement, contract, or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act;

(v) Any commodity option authorized under section 4c of the Act; and

(vi) Any leverage transaction authorized under section 19 of the Act.

(5) *Non-research personnel. This term means* any employee of the business trading unit or clearing unit, or any other employee of the swap dealer or major swap participant, other than an employee performing a legal or compliance function, who is not directly responsible for, or otherwise not involved in, research or analysis intended for inclusion in a research report.

(6) *Public appearance. This term means* any participation in a conference call, seminar, forum (including an interactive electronic forum) or other public speaking activity before 15 or more persons (individuals or entities), or interview or appearance before one or more representatives of the media, radio, television or print media, or the writing of a print media article, in which a research analyst makes a recommendation or offers an opinion concerning a derivatives transaction. This term does not include a password-protected Webcast, conference call or similar event with 15 or more existing

customers, provided that all of the event participants previously received the most current research report or other documentation that contains the required applicable disclosures, and that the research analyst appearing at the event corrects and updates during the public appearance any disclosures in the research report that are inaccurate, misleading, or no longer applicable.

(7) *Research analyst. This term means* the employee of a swap dealer or major swap participant who is primarily responsible for, and any employee who reports directly or indirectly to such research analyst in connection with, preparation of the substance of a research report relating to any derivative, whether or not any such person has the job title of “research analyst.”

(8) *Research department. This term means* any department or division that is principally responsible for preparing the substance of a research report relating to any derivative on behalf of a swap dealer or major swap participant, including a department or division contained in an affiliate of a swap dealer or major swap participant.

(9) *Research report. This term means* any written communication (including electronic) that includes an analysis of the price or market for any derivative, and that provides information reasonably sufficient upon which to base a decision to enter into a derivatives transaction. This term does not include:

(i) Communications distributed to fewer than 15 persons;

(ii) Commentaries on economic, political, or market conditions;

(iii) Statistical summaries of multiple companies’ financial data, including listings of current ratings;

(iv) Periodic reports or other communications prepared for investment company shareholders or commodity pool participants that discuss individual derivatives positions in the context of a fund’s past performance or the basis for previously-made discretionary decisions;

(v) Any communications generated by an employee of the business trading unit that is conveyed as a solicitation for entering into a derivatives transaction, and is conspicuously identified as such; and

(vi) Internal communications that are not given to current or prospective customers.

(b) *Policies and procedures.* Each swap dealer and major swap participant subject to this rule must adopt and implement written policies and procedures reasonably designed to ensure that the swap dealer or major swap participant and its employees comply with the provisions of this rule.

(c) *Research analysts and research reports—(1) Restrictions on relationship with research department.* (i) Non-research personnel shall not direct a research analyst's decision to publish a research report of the swap dealer or major swap participant, and non-research personnel shall not direct the views and opinions expressed in a research report of the swap dealer or major swap participant.

(ii) No research analyst may be subject to the supervision or control of any employee of the swap dealer's or major swap participant's business trading unit or clearing unit, and no employee of the business trading unit or clearing unit may have any influence or control over the evaluation or compensation of a research analyst.

(iii) Except as provided in paragraph (c)(1)(iv) of this section, non-research personnel, other than the board of directors and any committee thereof, shall not review or approve a research report of the swap dealer or major swap participant before its publication.

(iv) Non-research personnel may review a research report before its publication as necessary only to verify the factual accuracy of information in the research report, to provide for non-substantive editing, to format the layout or style of the research report, or to identify any potential conflicts of interest, provided that:

(A) Any written communication between non-research personnel and research department personnel concerning the content of a research report must be made either through authorized legal or compliance personnel of the swap dealer or major swap participant or in a transmission copied to such personnel; and

(B) Any oral communication between non-research personnel and research department personnel concerning the

content of a research report must be documented and made either through authorized legal or compliance personnel acting as an intermediary or in a conversation conducted in the presence of such personnel.

(2) *Restrictions on communications.* Any written or oral communication by a research analyst to a current or prospective counterparty relating to any derivative must not omit any material fact or qualification that would cause the communication to be misleading to a reasonable person.

(3) *Restrictions on research analyst compensation.* A swap dealer or major swap participant may not consider as a factor in reviewing or approving a research analyst's compensation his or her contributions to the swap dealer's or major swap participant's trading or clearing business. Except for communicating client or customer feedback, ratings, and other indicators of research analyst performance to research department management, no employee of the business trading unit or clearing unit of the swap dealer or major swap participant may influence the review or approval of a research analyst's compensation.

(4) *Prohibition of promise of favorable research.* No swap dealer or major swap participant may directly or indirectly offer favorable research, or threaten to change research, to an existing or prospective counterparty as consideration or inducement for the receipt of business or compensation.

(5) *Disclosure requirements—(i) Ownership and material conflicts of interest.* A swap dealer or major swap participant must disclose in research reports and a research analyst must disclose in public appearances:

(A) Whether the research analyst maintains a financial interest in any derivative of a type, class, or, category that the research analyst follows, and the general nature of the financial interest; and

(B) Any other actual, material conflicts of interest of the research analyst or swap dealer or major swap participant of which the research analyst has knowledge at the time of publication of the research report or at the time of the public appearance.

(ii) *Prominence of disclosure.* Disclosures and references to disclosures must be clear, comprehensive, and prominent. With respect to public appearances by research analysts, the disclosures required by this paragraph (c)(5) must be conspicuous.

(iii) *Records of public appearances.* Each swap dealer and major swap participant must maintain records of public appearances by research analysts sufficient to demonstrate compliance by those research analysts with the applicable disclosure requirements under this paragraph (c)(5).

(iv) *Third-party research reports.* (A) For the purposes of this paragraph (c)(5)(iv), “independent third-party research report” shall mean a research report, in respect of which the person or entity producing the report:

(1) Has no affiliation or business or contractual relationship with the distributing swap dealer or major swap participant, or that swap dealer’s or major swap participant’s affiliates, that is reasonably likely to inform the content of its research reports; and

(2) Makes content determinations without any input from the distributing swap dealer or major swap participant or that swap dealer’s or major swap participant’s affiliates.

(B) Subject to paragraph (c)(5)(iv)(C) of this section, if a swap dealer or major swap participant distributes or makes available any independent third-party research report, the swap dealer or major swap participant must accompany the research report with, or provide a Web address that directs the recipient to, the current applicable disclosures, as they pertain to the swap dealer or major swap participant, required by this section. Each swap dealer and major swap participant must establish written policies and procedures reasonably designed to ensure the completeness and accuracy of all applicable disclosures.

(C) The requirements of paragraph (c)(5)(iv)(B) of this section shall not apply to independent third-party research reports made available by a swap dealer or major swap participant to its customers:

(1) Upon request; or

(2) Through a Web site maintained by the swap dealer or major swap participant.

(6) *Prohibition of retaliation against research analysts.* No swap dealer or major swap participant, and no employee of a swap dealer or major swap participant who is involved with the swap dealer’s or major swap participant’s pricing, trading, or clearing activities, may, directly or indirectly, retaliate against or threaten to retaliate against any research analyst employed by the swap dealer or major swap participant or its affiliates as a result of an adverse, negative, or otherwise unfavorable research report or public appearance written or made, in good faith, by the research analyst that may adversely affect the swap dealer’s or major swap participant’s present or prospective pricing, trading, or clearing activities.

(d) *Clearing activities.* (1) No swap dealer or major swap participant shall directly or indirectly interfere with or attempt to influence the decision of the clearing unit of any affiliated clearing member of a derivatives clearing organization to provide clearing services and activities to a particular customer, including but not limited to a decision relating to the following:

(i) Whether to offer clearing services and activities to a particular customer;

(ii) Whether to accept a particular customer for the purposes of clearing derivatives;

(iii) Whether to submit a customer’s transaction to a particular derivatives clearing organization;

(iv) Whether to set or adjust risk tolerance levels for a particular customer;

(v) Whether to accept certain forms of collateral from a particular customer; or

(vi) Whether to set a particular customer’s fees for clearing services based upon criteria that are not generally available and applicable to other customers of the swap dealer or major swap participant.

(2) Each swap dealer and major swap participant shall create and maintain an appropriate informational partition, as specified in section 4s(j)(5)(A) of the Act, between business trading units of

the swap dealer or major swap participant and clearing units of any affiliated clearing member of a derivatives clearing organization to reasonably ensure compliance with the Act and the prohibitions specified in paragraph (d)(1) of this section. At a minimum, such informational partitions shall require that no employee of a business trading unit of a swap dealer or major swap participant shall supervise, control, or influence any employee of the clearing unit of any affiliated clearing member of a derivatives clearing organization.

(e) *Undue influence on counterparties.* Each swap dealer and major swap participant must adopt and implement written policies and procedures that mandate the disclosure to its counterparties of any material incentives and any material conflicts of interest regarding the decision of a counterparty:

(1) Whether to execute a derivative on a swap execution facility or designated contract market; or

(2) Whether to clear a derivative through a derivatives clearing organization.

(f) All records that a swap dealer or major swap participant is required to maintain pursuant to this regulation shall be maintained in accordance with Commission Regulation §1.31 and shall be made available promptly upon request to representatives of the Commission and to representatives of the applicable prudential regulator, as defined in 7 U.S.C. 1a(39).

**§ 23.606 General information: availability for disclosure and inspection.**

(a) *Disclosure of information.* (1) Each swap dealer and major swap participant shall make available for disclosure to and inspection by the Commission and its prudential regulator, as applicable, all information required by, or related to, the Commodity Exchange Act and Commission regulations, including:

(i) The terms and condition of its swaps;

(ii) Its swaps trading operations, mechanisms, and practices;

(iii) Financial integrity and risk management protections relating to swaps; and

(iv) Any other information relevant to its trading in swaps.

(2) Such information shall be made available promptly, upon request, to Commission staff and the staff of the applicable prudential regulator, at such frequency and in such manner as is set forth in the Commodity Exchange Act, Commission regulations, or the regulations of the applicable prudential regulator.

(b) *Ability to provide information.* (1) Each swap dealer and major swap participant shall establish and maintain reliable internal data capture, processing, storage, and other operational systems sufficient to capture, process, record, store, and produce all information necessary to satisfy its duties under the Commodity Exchange Act and Commission regulations. Such systems shall be designed to produce the information within the time frames set forth in the Commodity Exchange Act and Commission regulations or upon request, as applicable.

(2) Each swap dealer and major swap participant shall establish, implement, maintain, and enforce written procedures for the capture, processing, recording, storage, and production of all information necessary to satisfy its duties under the Commodity Exchange Act and Commission regulations.

(c) *Record retention.* All records or reports that a swap dealer or major swap participant is required to maintain pursuant to this regulation shall be maintained in accordance with Commission Regulation §1.31 and shall be made available promptly upon request to representatives of the Commission and to representatives of applicable prudential regulators.

**§ 23.607 Antitrust considerations.**

(a) No swap dealer or major swap participant shall adopt any process or take any action that results in any unreasonable restraint of trade, or impose any material anticompetitive burden on trading or clearing, unless necessary or appropriate to achieve the purposes of the Commodity Exchange Act.

(b) Consistent with its obligations under paragraph (a) of this section,

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each swap dealer and major swap participant shall adopt policies and procedures to prevent actions that result in unreasonable restraint of trade, or impose any material anticompetitive burden on trading or clearing.

### § 23.608 Restrictions on counterparty clearing relationships.

No swap dealer or major swap participant entering into a swap to be submitted for clearing with a counterparty that is a customer of a futures commission merchant shall enter into an arrangement that:

(a) Discloses to the futures commission merchant or any swap dealer or major swap participant the identity of a customer's original executing counterparty;

(b) Limits the number of counterparties with whom a customer may enter into a trade;

(c) Restricts the size of the position a customer may take with any individual counterparty, apart from an overall limit for all positions held by the customer with the swap dealer or major swap participant;

(d) Impairs a customer's access to execution of a trade on terms that have a reasonable relationship to the best terms available; or

(e) Prevents compliance with the timeframes set forth in § 1.74(b), § 23.610(b), or § 39.12(b)(7) of this chapter.

[77 FR 21308, Apr. 9, 2012]

### § 23.609 Clearing member risk management.

(a) With respect to clearing activities in futures, security futures products, swaps, agreements, contracts, or transactions described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act, commodity options authorized under section 4c of the Act, or leveraged transactions authorized under section 19 of the Act, each swap dealer or major swap participant that is a clearing member of a derivatives clearing organization shall:

(1) Establish risk-based limits based on position size, order size, margin requirements, or similar factors;

(2) Screen orders for compliance with the risk-based limits in accordance with the following:

(i) For transactions subject to automated execution, the clearing member shall use automated means to screen orders for compliance with the risk-based limits; and

(ii) For transactions subject to non-automated execution, the clearing member shall establish and maintain systems of risk controls reasonably designed to ensure compliance with the limits.

(3) Monitor for adherence to the risk-based limits intra-day and overnight;

(4) Conduct stress tests under extreme but plausible conditions of all positions at least once per week;

(5) Evaluate its ability to meet initial margin requirements at least once per week;

(6) Evaluate its ability to meet variation margin requirements in cash at least once per week;

(7) Evaluate its ability to liquidate the positions it clears in an orderly manner, and estimate the cost of the liquidation; and

(8) Test all lines of credit at least once per year.

(b) Each swap dealer or major swap participant that is a clearing member of a derivatives clearing organization shall:

(1) Establish written procedures to comply with this regulation; and

(2) Keep full, complete, and systematic records documenting its compliance with this regulation.

(3) All records required to be maintained pursuant to these regulations shall be maintained in accordance with Commission Regulation § 1.31 and shall be made available promptly upon request to representatives of the Commission and to representatives of applicable prudential regulators.

[77 FR 21308, Apr. 9, 2012]

### § 23.610 Clearing member acceptance for clearing.

(a) Each swap dealer or major swap participant that is a clearing member of a derivatives clearing organization shall coordinate with each derivatives clearing organization on which it clears to establish systems that enable the clearing member, or the derivatives clearing organization acting on its behalf, to accept or reject each trade submitted to the derivatives



## § 23.611

clearing organization for clearing by or for the clearing member as quickly as would be technologically practicable if fully automated systems were used; and

(b) Each swap dealer or major swap participant that is a clearing member of a derivatives clearing organization shall accept or reject each trade submitted by or for it as quickly as would be technologically practicable if fully automated systems were used; a clearing member may meet this requirement by:

(1) Establishing systems to pre-screen orders for compliance with criteria specified by the clearing member;

(2) Establishing systems that authorize a derivatives clearing organization to accept or reject on its behalf trades that meet, or fail to meet, criteria specified by the clearing member; or

(3) Establishing systems that enable the clearing member to communicate to the derivatives clearing organization acceptance or rejection of each trade as quickly as would be technologically practicable if fully automated systems were used.

[77 FR 21308, Apr. 9, 2012]

### **§ 23.611 Delegation of authority to the Director of the Division of Clearing and Risk to establish an alternative compliance schedule to comply with clearing member acceptance for clearing.**

(a) The Commission hereby delegates to the Director of the Division of Clearing and Risk or such other employee or employees as the Director may designate from time to time, the authority to establish an alternative compliance schedule for requirements of § 23.610 for swaps that are found to be technologically or economically impracticable for an affected swap dealer or major swap participant that seeks, in good faith, to comply with the requirements of § 23.610 within a reasonable time period beyond the date on which compliance by such swap dealer or major swap participant is otherwise required.

(b) A request for an alternative compliance schedule under this section shall be acted upon by the Director of the Division of Clearing and Risk within 30 days from the time such a request

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is received, or it shall be deemed approved.

(c) An exception granted under this section shall not cause a registrant to be out of compliance or deemed in violation of any registration requirements.

(d) Notwithstanding any other provision of this section, in any case in which a Commission employee delegated authority under this section believes it appropriate, he or she may submit to the Commission for its consideration the question of whether an alternative compliance schedule should be established. Nothing in this section shall be deemed to prohibit the Commission, at its election, from exercising the authority delegated in this section.

[77 FR 21308, Apr. 9, 2012]

## Subpart K [Reserved]

## Subpart L—Segregation of Assets Held as Collateral in Uncleared Swap Transactions

SOURCE: 78 FR 66636, Nov. 6, 2013, unless otherwise noted.

### **§ 23.700 Definitions.**

As used in this subpart:

*Initial Margin* means money, securities, or property posted by a party to a swap as performance bond to cover potential future exposures arising from changes in the market value of the position.

*Margin* means both Initial Margin and Variation Margin.

*Segregate*. To segregate two or more items is to keep them in separate accounts, and to avoid combining them in the same transfer between two accounts.

*Variation Margin* means a payment made by or collateral posted by a party to a swap to cover the current exposure arising from changes in the market value of the position since the trade was executed or the previous time the position was marked to market.

### **§ 23.701 Notification of right to segregation.**

(a) Prior to the execution of each swap transaction that is not submitted

for clearing, a swap dealer or major swap participant shall:

(1) Notify each counterparty to such transaction that the counterparty has the right to require that any Initial Margin the counterparty provides in connection with such transaction be segregated in accordance with §§ 23.702 and 23.703 except in those circumstances where segregation is mandatory pursuant to § 23.157;

(2) Identify one or more custodians, one of which must be a creditworthy non-affiliate and each of which must be a legal entity independent of both the swap dealer or major swap participant and the counterparty, as an acceptable depository for segregated Initial Margin; and

(3) Provide information regarding the price of segregation for each custodian identified in paragraph (a)(2) of this section, to the extent that the swap dealer or major swap participant has such information.

(b) The right referred to in paragraph (a) of this section does not extend to Variation Margin.

(c) The notification referred to in paragraph (a) of this section shall be made to an officer of the counterparty responsible for the management of collateral. If no such party is identified by the counterparty to the swap dealer or major swap participant, then the notification shall be made to the Chief Risk Officer of the counterparty, or, if there is no such Officer, the Chief Executive Officer, or if none, the highest-level decision-maker for the counterparty.

(d) Prior to confirming the terms of any such swap, the swap dealer or major swap participant shall obtain from the counterparty confirmation of receipt by the person specified in paragraph (c) of this section of the notification specified in paragraph (a) of this section, and an election, if applicable, to require such segregation or not. The swap dealer or major swap participant shall maintain such confirmation and such election as business records pursuant to § 1.31 of this chapter.

(e) Notification pursuant to paragraph (a) of this section to a particular counterparty by a particular swap dealer or major swap participant need

only be made once in any calendar year.

(f) A counterparty's election, if applicable, to require segregation of Initial Margin or not to require such segregation, may be changed at the discretion of the counterparty upon written notice delivered to the swap dealer or major swap participant, which changed election shall be applicable to all swaps entered into between the parties after such delivery.

[78 FR 66636, Nov. 6, 2013, as amended at 81 FR 704, Jan. 6, 2016]

**§ 23.702 Requirements for segregated margin.**

(a) The custodian of Margin, segregated pursuant to an election under § 23.701, must be a legal entity independent of both the swap dealer or major swap participant and the counterparty.

(b) Initial Margin that is segregated pursuant to an election under § 23.701 must be held in an account segregated for and on behalf of the counterparty, and designated as such. Such an account may, if the swap dealer or major swap participant and the counterparty agree, also hold Variation Margin.

(c) Any agreement for the segregation of Margin pursuant to this section shall be in writing, shall include the custodian as a party, and shall provide that:

(1) Any withdrawal of such Margin, other than pursuant to paragraph (c)(2) of this section, shall only be made pursuant to the agreement of both the counterparty and the swap dealer or major swap participant, and notification of such withdrawal shall be given immediately to the non-withdrawing party;

(2) Turnover of control of such Margin shall be made without the written consent of both parties, as appropriate, to the counterparty or to the swap dealer or major swap participant, promptly upon presentation to the custodian of a statement in writing, made under oath or under penalty of perjury as specified in 28 U.S.C. 1746, by an authorized representative of either such party, stating that such party is entitled to such control pursuant to an agreement between the parties. The

other party shall be immediately notified of such turnover.

**§ 23.703 Investment of segregated margin.**

(a) Margin that is segregated pursuant to an election under § 23.701 may only be invested consistent with § 1.25 of this chapter.

(b) Subject to paragraph (a) of this section, the swap dealer or major swap participant and the counterparty may enter into any commercial arrangement, in writing, regarding the investment of such Margin, and the related allocation of gains and losses resulting from such investment.

**§ 23.704 Requirements for non-segregated margin.**

(a) The chief compliance officer of each swap dealer or major swap participant shall report to each counterparty that does not choose to require segregation of Initial Margin pursuant to § 23.701(a), no later than the fifteenth business day of each calendar quarter, on whether or not the back office procedures of the swap dealer or major swap participant relating to margin and collateral requirements were, at any point during the previous calendar quarter, not in compliance with the agreement of the counterparties.

(b) The obligation specified in paragraph (a) of this section shall apply with respect to each counterparty no earlier than the 90th calendar day after the date on which the first swap is transacted between the counterparty and the swap dealer or major swap participant.

**APPENDIX A TO SUBPART H OF PART 23—  
GUIDANCE ON THE APPLICATION OF  
§§ 23.434 AND 23.440 FOR SWAP DEALERS  
THAT MAKE RECOMMENDATIONS  
TO COUNTERPARTIES OR SPECIAL ENTITIES**

The following provides guidance on the application of §§ 23.434 and 23.440 to swap dealers that make recommendations to counterparties or Special Entities.

*Section 23.434—Recommendations to  
Counterparties—Institutional Suitability*

A swap dealer that recommends a swap or trading strategy involving a swap to a counterparty, other than a swap dealer, major swap participant, security-based swap

dealer or major security-based swap participant, must undertake reasonable diligence to understand the potential risks and rewards associated with the recommended swap or trading strategy involving a swap—general suitability (§ 23.434(a)(1))—and have a reasonable basis to believe that the recommended swap or trading strategy involving a swap is suitable for the counterparty—specific suitability (§ 23.434(a)(2)). To satisfy the general suitability obligation, a swap dealer must undertake reasonable diligence that will vary depending on, among other things, the complexity of and risks associated with the swap or swap trading strategy and the swap dealer's familiarity with the swap or swap trading strategy. At a minimum, a swap dealer's reasonable diligence must provide it with an understanding of the potential risks and rewards associated with the recommended swap or swap trading strategy.

*Recommendation.* Whether a communication between a swap dealer and a counterparty is a recommendation will turn on the facts and circumstances of the particular situation. There are, however, certain factors the Commission will consider in reaching such a determination. The facts and circumstances determination of whether a communication is a "recommendation" requires an analysis of the content, context, and presentation of the particular communication or set of communications. The determination of whether a "recommendation" has been made, moreover, is an objective rather than a subjective inquiry. An important factor in this regard is whether, given its content, context, and manner of presentation, a particular communication from a swap dealer to a counterparty reasonably would be viewed as a "call to action," or suggestion that the counterparty enter into a swap. An analysis of the content, context, and manner of presentation of a communication requires examination of the underlying substantive information transmitted to the counterparty and consideration of any other facts and circumstances, such as any accompanying explanatory message from the swap dealer. Additionally, the more individually tailored the communication to a specific counterparty or a targeted group of counterparties about a swap, group of swaps or trading strategy involving the use of a swap, the greater the likelihood that the communication may be viewed as a "recommendation."

*Safe harbor.* A swap dealer may satisfy the safe harbor requirements of § 23.434(b) to fulfill its counterparty-specific suitability duty under § 23.434(a)(2) if: (1) The swap dealer reasonably determines that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks with regard to the relevant swap or trading strategy involving a swap; (2) the

counterparty or its agent represents in writing that it is exercising independent judgment in evaluating the recommendations of the swap dealer; (3) the swap dealer discloses in writing that it is acting in its capacity as a counterparty and is not undertaking to assess the suitability of the recommendation; and (4) in the case of a counterparty that is a Special Entity, the swap dealer complies with § 23.440 where the recommendation would cause the swap dealer to act as an advisor to a Special Entity within the meaning of § 23.440(a).

To reasonably determine that the counterparty, or an agent to which the counterparty has delegated decision-making authority, is capable of independently evaluating investment risks of a recommendation, the swap dealer can rely on the written representations of the counterparty, as provided in § 23.434(c). Section 23.434(c)(1) provides that a swap dealer will satisfy § 23.434(b)(1)'s requirement with respect to a counterparty other than a Special Entity if it receives representations that the counterparty has complied in good faith with the counterparty's policies and procedures that are reasonably designed to ensure that the persons responsible for evaluating the recommendation and making trading decisions on behalf of the counterparty are capable of doing so. Section § 23.434(c)(2) provides that a swap dealer will satisfy § 23.434(b)(1)'s requirement with respect to a Special Entity if it receives representations that satisfy the terms of § 23.450(d) regarding a Special Entity's qualified independent representative.

Prong (4) of the safe harbor clarifies that § 23.434's application is broader than § 23.440—Requirements for Swap Dealers Acting as Advisors to Special Entities. Section 23.434 is triggered when a swap dealer recommends any swap or trading strategy that involves a swap to any counterparty. However, § 23.440 is limited to a swap dealer's recommendations (1) to a Special Entity (2) of swaps that are tailored to the particular needs or characteristics of the Special Entity. Thus, a swap dealer that recommends a swap to a Special Entity that is tailored to the particular needs or characteristics of the Special Entity may comply with its suitability obligation by satisfying the safe harbor in § 23.434(b); however, the swap dealer must also comply with § 23.440 in such circumstances.

*Section 23.440—Requirements for Swap Dealers Acting as Advisors to Special Entities*

A swap dealer “acts as an advisor to a Special Entity” under § 23.440 when the swap dealer recommends a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity. A swap dealer that “acts as an advisor to a Special Entity” has a duty to

make a reasonable determination that a recommendation is in the “best interests” of the Special Entities and must undertake “reasonable efforts” to obtain information necessary to make such a determination.

Whether a swap dealer “acts as an advisor to a Special Entity” will depend on: (1) Whether the swap dealer has made a recommendation to a Special Entity; and (2) whether the recommendation concerns a swap or trading strategy involving a swap that is tailored to the particular needs or characteristics of the Special Entity. To determine whether a communication between a swap dealer and counterparty is a recommendation, the Commission will apply the same factors as under § 23.434, the suitability rule. However, unlike the suitability rule, which covers recommendations regarding any type of swap or trading strategy involving a swap, the “acts as an advisor rule” and “best interests” duty will be triggered only if the recommendation is of a swap or trading strategy involving a swap that is “tailored to the particular needs or characteristics of the Special Entity.”

Whether a swap is tailored to the particular needs or characteristics of the Special Entity will depend on the facts and circumstances. Swaps with terms that are tailored or customized to a specific Special Entity's needs or objectives, or swaps with terms that are designed for a targeted group of Special Entities that share common characteristics, *e.g.*, school districts, are likely to be viewed as tailored to the particular needs or characteristics of the Special Entity. Generally, however, the Commission would not view a swap that is “made available for trading” on a designated contract market or swap execution facility, as provided in Section 2(h)(8) of the Act, as tailored to the particular needs or characteristics of the Special Entity.

*Safe harbor.* Under § 23.440(b)(2), when dealing with a Special Entity (including a Special Entity that is an employee benefit plan as defined in § 23.401(c)(3)),<sup>1</sup> a swap dealer will not “act as an advisor to a Special Entity” if: (1) The swap dealer does not express an opinion as to whether the Special Entity should enter into a recommended swap or swap trading strategy that is tailored to the particular needs or characteristics of the Special Entity; (2) the Special Entity represents in writing, in accordance with § 23.402(d), that it will not rely on the swap

<sup>1</sup>The guidance in this appendix regarding the safe harbor to § 23.440 is limited to the safe harbor for any Special Entity under § 23.440(b)(2). A swap dealer may separately comply with the safe harbor under § 23.440(b)(1) for its communications to a Special Entity that is an employee benefit plan as defined in § 23.401(c)(3).

dealer's recommendations and will rely on advice from a qualified independent representative within the meaning of §23.450; and (3) the swap dealer discloses that it is not undertaking to act in the best interests of the Special Entity.

A swap dealer that elects to communicate within the safe harbor to avoid triggering the "best interests" duty must appropriately manage its communications. To clarify the type of communications that they will make under the safe harbor, the Commission expects that swap dealers may specifically represent that they will not express an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy, and that for such advice the Special Entity should consult its own advisor. Nothing in the final rule would preclude such a representation from being included in counterparty relationship documentation. However, such a representation would not act as a safe harbor under the rule where, contrary to the representation, the swap dealer does express an opinion to the Special Entity as to whether it should enter into a recommended swap or trading strategy.

If a swap dealer complies with the terms of the safe harbor, the following types of communications would not be subject to the "best interests" duty:<sup>2</sup> (1) Providing information that is general transaction, financial, educational, or market information; (2) offering a swap or trading strategy involving a swap, including swaps that are tailored to the needs or characteristics of a Special Entity; (3) providing a term sheet, including terms for swaps that are tailored to the needs or characteristics of a Special Entity; (4) responding to a request for a quote from a Special Entity; (5) providing trading ideas for swaps or swap trading strategies, including swaps that are tailored to the needs or characteristics of a Special Entity; and (6) providing marketing materials upon request or on an unsolicited basis about swaps or swap trading strategies, including swaps that are tailored to the needs or characteristics of a Special Entity. This list of communications is not exclusive and should not create a negative implication that other types of communications are subject to a "best interests" duty.

<sup>2</sup>Communications on the list that are not within the meaning of the term "acts as an advisor to a Special Entity" are outside the requirements of §23.440. By including such communications on the list, the Commission does not intend to suggest that they are "recommendations." Thus, a swap dealer that does not "act as an advisor to a Special Entity" within the meaning of §23.440(a) is not required to comply with the safe harbor to avoid the "best interests" duty with respect to its communications.

The safe harbor in §23.440(b)(2) allows a wide range of communications and interactions between swap dealers and Special Entities without invoking the "best interests" duty, including discussions of the advantages or disadvantages of different swaps or trading strategies. The Commission notes, however, that depending on the facts and circumstances, some of the examples on the list could be "recommendations" that would trigger a suitability obligation under §23.434. However, the Commission has determined that such activities would not, by themselves, prompt the "best interests" duty in §23.440, provided that the parties comply with the other requirements of §23.440(b)(2). All of the swap dealer's communications, however, must be made in a fair and balanced manner based on principles of fair dealing and good faith in compliance with §23.433.

Swap dealers engage in a wide variety of communications with counterparties in the normal course of business, including but not limited to the six types of communications listed above. Whether any particular communication will be deemed to be a "recommendation" within the meaning of §§23.434 or 23.440 will depend on the facts and circumstances of the particular communication considered in light of the guidance in this appendix with respect to the meaning of the term "recommendation." Swap dealers that choose to manage their communications to comply with the safe harbors provided in §§23.434 and 23.440 will be able to limit the duty they owe to counterparties, including Special Entities, provided that the parties exchange the appropriate representations.

## PART 30—FOREIGN FUTURES AND FOREIGN OPTIONS TRANSACTIONS

### Sec.

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### APPENDIX A TO PART 30—INTERPRETATIVE STATEMENT WITH RESPECT TO THE COMMISSION'S EXEMPTIVE AUTHORITY UNDER §30.10 OF ITS RULES